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LEGAL ASPECTS OF ABILITY GROUPING, TRACKING, AND CLASSIFICATION

by

Charles P. Bentley

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APPROVAL PAGE

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While some school officials have concluded that ability grouping causes more problems than it solves and thus have abandoned such practices within the schools, many school systems continue to utilize various forms of ability or achievement grouping. Even in those schools where ability grouping is not practiced, various forms of student classification and sorting are employed throughout the school day. The purpose of this study is to provide school officials with a comprehensive set of data concerning both the educational and the legal issues associated with ability grouping, tracking, and classification practices in order that they can make decisions concerning these practices which are educationally and legally sound.

Even though the major educational questions concerning ability grouping are reviewed in this study, it is not intended that this study reach any conclusions regarding the educational advantages or disadvantages of such practices; rather, the purpose is to identify those educational issues associated with ability grouping and tracking which might become litigious in the future.

Data and information for this study were obtained from an analysis of the major educational studies related to ability grouping and from a review and analysis of the major court cases which relate to ability grouping, testing, and classification of students. Legal precedents and legal trends are identified from this review. These legal precedents are related to the following educational issues: ability grouping and

equal educational opportunity; ability grouping and the use of standardized tests, ability grouping and academic achievement; and ability grouping and the affective domain.

With the increased emphasis on educating all handicapped students in the public schools, the process of identifying and placing students into specific educational programs is increasing. School officials must develop policies and implement plans for student classification which will guarantee due process of law for all students before they can be placed into any programs which might tend to stigmatize the students.

This dissertation provides school officials a comprehensive review of the educational issues associated with ability grouping, tracking, and classification practices; it also provides them with an analysis of the legal issues which are associated with these educational questions. The uniqueness of the dissertation is that it provides decision-makers with a set of guidelines to follow when making decisions regarding grouping practices. These guidelines, if followed, should enable school officials to make decisions related to these organizational practices which will be both educationally and legally sound. Even though the recommendations concerning grouping and classification appear to be legally sound, school officials should check with an attorney before implementing a policy based on these regulations.

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Chapter 1

INTRODUCTION

Since 1920, much of the literature concerning American education has related directly or indirectly to the issue of ability grouping. Numerous research studies, journal articles, and surveys have been published concerning the educational advantages and disadvantages of ability grouping.

Much of the research indicates that the practice of ability grouping does not result in increased learning. While the academicians debate the educational merits of such practices, grouping, tracking, and related student assignment schemes continue to flourish within the public schools.

Neither the academicians nor the courts have thus far been able to lay the problem to rest. While the specific question of the legality of ability grouping has not been adjudicated by the courts, a number of related issues, such as using the results of standardized tests for student classification, have been decided upon by the courts. As this study shows, indications are that both the educational and the legal debates will continue.

One factor likely to stimulate additional debate as well as court interpretation of the issues involved is the recently enacted Education for All Handicapped Children Act (P. L. 94-142), which requires that appropriate educational experiences be provided for all children regardless of their handicap. With this new legislation will come further testing of various issues related to the placement of students

in special classes. This study will review court cases dealing with the grouping and tracking of students in general and will review the major court cases that have already been decided in the area of classification and placement of students into special classes.

Whereas the educational journals are filled with articles and studies concerning the educational issues of grouping and tracking, there is a scarcity of published material concerning the legal ramifications of such practices. Selected key studies relating to the educational and legal aspects of grouping, tracking and classification are reviewed in this study in order that the judicial issues can better be interpreted.

The overall purpose of this study is to provide educational decision-makers with appropriate information regarding the educational and legal aspects of grouping and tracking practices in order that they will be able to make decisions regarding these issues that are both educationally and legally sound.

STATEMENT OF THE PROBLEM

It is obvious that administrators and other educational decision-makers face a dilemma today. In addition to parent awareness of due process rights and problems inherent in implementing the provisions of the recently-passed federal law, P. L. 94-142, requiring appropriate educational opportunities for all handicapped students, state legislatures and other pressure groups want educators to be more accountable for the product produced by the public schools as measured by some form of standardized test. At the same time, other pressure groups are

demanding that schools become more humanistic and be less concerned with group norms, standardized tests and other aspects of regimentation.

Thus, there is a need for examining the educational and legal issues associated with the grouping, tracking, and classification of students within the public schools so that decision-makers will have appropriate information to use in dealing with this dilemma. Specific guidelines need to be developed for administrators to use when making decisions regarding grouping, tracking, and classification practices.

Since the question of whether ability grouping is good or bad for students continues to be widely debated among educators, there is a need to review the major educational issues for the purpose of determining whether there is a consensus as to the advantages or disadvantages of ability grouping and to determine whether the educational issues are directly or indirectly related to the legal issues.

QUESTIONS TO BE ANSWERED

One of the stated purposes of this study is the development of practical, legal guidelines for educational decision-makers to have at their disposal when faced with making decisions concerning grouping, tracking, or classifying students. Below are listed several key questions which research needs to answer in order for the legal guidelines to be developed.

1. What are the major educational issues regarding grouping and tracking?

2. Which of these issues are likely to be included in court cases related to grouping and tracking practices?

3. Which of the legal principles established by the "landmark" cases regarding racial segregation and due process are applicable to legal issues involving grouping and tracking?

4. Can school officials continue to use the results of standardized tests for purposes of assigning students to various tracks or groups?

5. Based on the results of recent court cases, what specific issues related to grouping and tracking currently are being litigated?

6. Can any specific trends be determined from the analysis of the court cases?

7. Based on the established legal precedents, what are the legally acceptable criteria for grouping decisions?

SCOPE OF THE STUDY

This is a historical study of the legal ramifications of academic and/or ability grouping of public school students in the United States. The research describes the extent to which these grouping practices have been challenged and litigated, the reasons for the litigation, the results of the major court cases, and the possible effects these court decisions will have on school boards and school officials.

Even though this study includes numerous references to the educational imperatives as they relate to the judicial questions regarding the legality of grouping practices in the public schools, no attempt has been made to settle the continuing debate regarding the merits or fallacies of such practices.

The major thrust of the research is directed toward the legal aspects of grouping and tracking practices involving the "normal"

students; however, legal questions such as due process of law, the use of test results for placement, and denial of equal educational opportunities are reviewed in a section relating to "exceptional" children.

The study includes a review of the litigation related directly or indirectly to ability grouping, tracking, or classification of students. Major court cases related to these educational practices from 1954 through June of 1977 are included in this study.

METHODS, PROCEDURES, AND SOURCES OF INFORMATION

The basic research technique of this historical research study was to examine and analyze the available references concerning the legal aspects of ability grouping.

In order to determine if a need existed for such research, a search was made of Dissertation Abstracts for related topics. Journal articles related to the topic were located through use of such sources as Reader's Guide to Periodical Literature, Education Index, and the Index to Legal Periodicals.

General research summaries were found in the Encyclopedia of Educational Research, various books on school law, and in a review of related literature obtained through a computer search from the Educational Resources Information Center (ERIC).

Federal and state court cases related to the topic were located through use of the Corpus Juris Secundum, American Jurisprudence, the National Reporter System, and the American Digest System. Recent court cases were found by examining case summaries contained in the 1976 and 1977 issues of the Nolpe School Law Reporter. All of the cases were

read and placed in categories corresponding to the issues noted from the general literature review.

Other supplementary materials related specifically to the topics of classification and placement of students into special education classes were received from the Center for Law and Education at Harvard University, the United States Office of Education, the Research Division of the National Education Association, the Southern Regional Council in Atlanta, Georgia, and from the office of the General Assistance Center (GAC) at East Carolina University, Greenville, North Carolina.

DEFINITION OF TERMS

For the purposes of this study, the following selected terms are defined below:

Ability grouping. This is the practice of prejudging students' ability based on some type of intelligence tests and past performance, and then assigning two or more students to a particular instructional setting for a sustained period of time. Homogeneous grouping and ability grouping are terms which frequently are used interchangeably. Informally grouping students within the regular classroom for a short period of time for specialized instruction generally is not considered to be ability grouping.[1]

Achievement grouping. Grouping by achievement is very similar to ability grouping. Assignment of students to groups or levels is based

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[1]Harold G. Shane, "Grouping in the Elementary School," Phi Delta Kappan, XLII (April, 1960), 314; see also, Roger Mills and Miriam M. Bryan, Testing. . .Grouping: The New Segregation in Southern Schools? (Atlanta, Georgia: Southern Regional Council, 1976), pp. 2-11.

on the scores students make on achievement tests and on their past performance.[2]

Tracking. The practice of assigning students at the junior and senior high school levels to a specific curriculum such as general, vocational, business, or college preparatory is known as tracking. The assignment may be based on intelligence tests, achievement tests, past performance, teacher judgments, or a combination of these. Tracking is different from the various grouping practices of the elementary schools in that parents and students do have some choice in the programs of study. It should be noted that it is often difficult for a student to switch from one track to another because of the prerequisites required for various courses.[3]

Ability tests. Ability tests are frequently called aptitude and/or intelligence tests. These tests attempt to measure both native and acquired abilities, or the academic potential of the student. Theoretically, items on an ability test are based on research into the learning process as opposed to any particular academic discipline.[4]

Achievement tests. The achievement test attempts to measure how much a student has learned in the classroom. These tests generally involve skills in reading, arithmetic, language, and spelling.[5]

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[2]Dale L. Brubaker and Roland H. Nelson, Jr., Creative Survival in Educational Bureaucracies, (Berkeley, California: McCutchan Publishing Corporation, 1974), p. 50.

[3]Paul L. Tractenberg and Elaine Jacoby, "Pupil Testing: A Legal View," Phi Delta Kappan, LIX, No. 4 (December, 1977), 251.

[4]Mills and Bryan, op. cit., p. 72.

[5]Ibid.

Culture-fair test. Achievement or ability tests that contain items that are common to all cultures are called culture-fair tests. When there is a question of test discrimination, tests often are analyzed for cultural-bias.[6]

Standardized test. Tests which have been prepared by specialists, administered according to uniform directions, scored and interpreted in terms of normative data are called standardized tests. These can be either ability or achievement tests.[7]

Reliability. The extent to which a test is consistent in measuring whatever it claims to measure is called test reliability. If the same or similar test produces approximately the same results when the test is repeated, it is assumed that the test is reliable.[8]

Validity. If a test appropriately measures that which it is supposed to measure, it is labeled as having high validity. There are three types of test validity: Content validity is determined by comparing how well the test questions correspond to the course of study; concurrent validity measures how well the test scores correspond to the students' school grades, and predictive validity is determined by how well the future performance of the students matches the test scores.[9]

SIGNIFICANCE OF STUDY

The practices of ability grouping and tracking are perennial topics of debate among teachers, parents, administrators, and university

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[6]Ibid., p. 73. [7]Ibid., p. 78.

[8]Paul D. Leedy, Practical Research (New York: MacMillan Publishing Co., Inc., 1974), p. 150.

[9]Ibid.

theoreticians. Ability grouping has been called the most controversial issue of classroom organization,[10] and there appears to be no consensus as to its educational merits.[11]

Until the past decade, the controversy concerning ability grouping primarily centered around the issue of whether or not grouping and/or tracking increased student achievement in basic skills. During the seventies, however, the pure educational issue of achievement related to ability grouping became enmeshed in the larger societal issues of racial isolation, due process of law, and equal educational opportunities.[12] Thus, the ability grouping issue was moved from the non-legalistic arena of academic rhetoric into state and federal courtrooms.

In an article published in The Missouri School Law Letter in 1975, Bryson states that the old educational arguments on both sides of the grouping question are merely preludes to the larger imperatives of American community desegregation, cultural desegregation, equal educational opportunities, and equal protection of the Constitution.[13] Educational decision-makers have to be concerned not only about the educational justification of grouping and tracking procedures, but also

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[10]John R. Goodlad, "Classroom Organization," Encyclopedia of Educational Research, ed. Chester W. Harris (New York: MacMillan, 1960), p.222.

[11]National Education Association, 1968 Research Summary (Washington, D. C.: National Education Association, 1968), p. 1.

[12]Chester Nolte, School Testing, Grouping and the Law, U. S. Educational Resources Information Center, ERIC Document ED 113 817, November, 1975), p. 8.

[13]Joseph E. Bryson, "Education and Legal Aspects of Grouping Students," Missouri School Law Letter, IV, No. 3 (October, 1975), 1.

with constitutional requirements as well. Nolte states that students are entitled to due process of law when they are being assigned to certain tracks and that the educator who makes the assignment must be able to prove that the assignment is in the child's best interest.[14] As of this date, this specific principle has not been tested in a court of law.

In the past, the courts have been reluctant to become involved in the issue of ability grouping. They have stated that the educational appropriateness of this practice is a matter which is best left to educators.[15] Where litigation has occurred in this area, decisions have been based on the results of the grouping in terms of classrooms becoming racially identifiable as opposed to their being based on the educational imperatives of the issue.[16]

While the practice of allowing educators to decide the issue of ability grouping has not been abridged by the courts, some decisions by the courts indicate that this practice may change. For example, in 1967, a federal court ruled that tracking, as administered, was unconstitutional because it deprived poor and black students of their right to equal educational opportunities.[17] This case, Hobson v. Hansen, is

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[14]Chester M. Nolte, Due Process and Its Historical Development in Education, U. S. Educational Resources Information Center, ERIC Document ED 088 186 (April, 1974), p. 14.

[15]Miller v. School District No. 2, Clarendon County, South Carolina, 256 F. Supp. 370 (D.S.C. 1966).

[16]Kelly, McNeal, et. al. v. Tate County School District, 508 F. 2nd, 1017 (Fifth Cir. 1975).

[17]Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967); see also Smuck v. Hobson, 408 F. 2nd 175 (D.C. Cir. 1969).

considered a landmark case in the arena of tracking and grouping. Judge J. Skelly Wright, in rendering this decision, stated that it was not his intention to tell local boards of education that they could not provide different kinds of education for different kinds of students; rather, he said his ruling meant that the school system would have to be able to prove that a tracking or grouping practice would result in better educational opportunities for low-ability students. Thus, this decision technically did not say that the practice of tracking, per se, was unconstitutional.[18] The major constitutional questions in this case that relate to this research are discussed on pages 106-110 in chapter four of this study.

Numerous court cases involving the question of grouping practices and racial intent occurred during the five-year period from 1968 through 1973. With few exceptions, the federal courts ruled that ability grouping was unconstitutional if it resulted in re-segregating classes or if the grouping were based on racially-biased tests.[19]

Since 1973, the incidence of cases involving grouping and racial discrimination has diminished; however, there is a notable increase in litigation involving questions of due process and individual rights and equal educational opportunities related to grouping and classification practices.[20] Since American society, in general, seems to be placing

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[18] Ibid.

[19] Singleton v. Jackson Municipal Separate School District, 419 F. 2nd 1211 (Fifth Cir. 1970); see also United States v. Tunico County School District, 421 F. 2d 1236 (Fifth Cir. 1970); also, United States v. Sunflower County School District, 430 F. 2d 839 (Fifth Cir. 1970).

[20] Nolte, Due Process and Its Historical Development in Education, op. cit., p. 13.

more and more emphasis on individual freedoms, it is not surprising that questions regarding deprivation of an individual's constitutional rights without due process are now the norm rather than the exception. Neither is it unexpected that there is an increase in court cases involving such public school practices as sorting, classifying, and labeling children.[21]

Parents who raise official questions regarding grouping or classification policies generally question whether such grouping offends the due process and equal protection clauses of the United States Constitution. Due process questions generally are concerned with whether students are afforded procedural safeguards which insure that any label or grouping of consequence has been fairly applied. In some cases, however, parents may even question the label itself, thus resulting in substantive due process questions.[22]

In 1975, the United States Congress passed the Education For All Handicapped Children Act (P. L. 94-142). This law includes provisions requiring equal educational opportunities for all children. It also provides for specific safeguards regarding the assignment of children to classes for exceptional children.[23] As school officials attempt to implement this law, it is likely that litigation in this area will increase.

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[21]Merle McClung, "School Classification: Some Legal Approaches to Labels," Classification Materials, (Cambridge, Massachusetts: Harvard University Center for Law and Education, 1973), p. 5.

[22]Ibid.

[23]The Education For All Handicapped Children Act of 1975, P. L. 94-142, sect. 615 (20 U. S. C. 1411 et. seq.).

As these legal questions increase, school administrators, teachers, and board members must be able to justify any grouping practices. If grouping practices result in resegregating the classrooms or if arbitrary groupings occur without due process, resulting in unequal educational opportunities, school officials could find themselves involved in litigation which could result in financial liability for administrators and board members.[24] School officials must consider the constitutional rights of the students along with the educational merits of any grouping practice before making their assignments.

Thus, this study is significant in that it provides educational decision-makers with a comprehensive analysis of the legal aspects of grouping students in the public schools. The study provides educational leaders with a set of guidelines to use when making crucial decisions regarding grouping--guidelines which may prevent decision-makers from becoming involved in litigation.

Status of Grouping Practices in the Public Schools

The significance of this study can be accentuated by analyzing the scope of grouping and tracking practices in the public schools. A review of recent studies concerning ability grouping indicates that this practice is increasing across the nation. In general, this practice is more widely used in large administrative units than in the smaller ones.

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[24]Warren G. Findley and Miriam M. Bryan, Ability Grouping: 1970, Status, Impact, and Alternatives (Athens, Georgia: University of Georgia Press, 1971), pp. 3-12; see also Miriam L. Goldberg, A. Harry Passow, and Joseph Justman, The Effects of Ability grouping (New York: Teachers College Press, 1966), pp. 3-23.

The research indicates that grouping is more prevalent as students progress to the higher grades, and indications are that the practice is likely to be even more widespread in the future.[25] In 1974, the National Education Association released a survey it had conducted regarding grouping practices. This survey revealed that over 70 percent of the schools in the large and medium-sized units currently practice some form of ability grouping. This same survey indicated that the trend to group students is increasing rather than decreasing.[26]

Since there is a trend to perpetuate and sustain ability grouping practices, it is significant that this study include a section on the effects of grouping on the principle of equal educational opportunities for all students. If the courts decide to examine ability grouping from a legal standpoint, it is likely that such decisions will be based on the issues of equal educational opportunities and denial of due process.[27]

DESIGN OF THE STUDY

The remainder of the study is divided into three major parts. Chapter two contains a review of related literature. In addition to the literature dealing specifically with the legal aspects of ability grouping, this section includes a summary review of the general educational

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[25]Ibid.

[26]National Education Association, Survey of Programs and Practices of Public School Students (Washington, D.C.: National Education Association, August, 1974), p. 1.

[27]Martha M. McCarthy, "Is the Equal Protection Clause Still a Viable Tool for Effecting Educational Reform?" Journal of Law and Education, VI, No. 2 (April, 1977), 160-162.

research on ability grouping and tracking. These reviews are included in this study so that the judicial issues of grouping and tracking can more appropriately be analyzed.

The third chapter includes a narrative discussion of the major issues relating to grouping and tracking. An attempt is made in this chapter to show the relationship between the legal issue and the major educational issues identified in the reviews of the literature in the previous chapter.

Chapter four contains a general listing and discussion of the recently litigated court cases which contain some references to the general topic of ability grouping. The first category of cases includes those United States Supreme Court landmark decisions relating broad constitutional issues of racial discrimination and due process law. Other categories of cases selected for review in this section include cases related to ability grouping and school desegregation, cases related to the use of tests for grouping purposes, and cases involving labeling and assigning children to classes for exceptional children.

The concluding chapter of the study contains a review and summary of the information obtained from the review of the literature and from the analysis of the selected court cases. The questions asked in the introductory part of the study are reviewed and answered in this chapter. Finally, a listing of legally acceptable criteria for grouping practices is included.

Chapter II

REVIEW OF THE LITERATURE

OVERVIEW

Some forms of grouping and classifying students have existed since the beginning of formal education in the United States. Many of the administrative procedures which have been used to accomplish ability grouping have caused considerable debate among educators, parents, and boards of education.

The practice of ability grouping began around 1915 and steadily increased until around 1935. Partially because the research was inconclusive as to the advantages of this technique, its use tended to diminish during the next two decades.[1] The Sputnik era ushered in a new wave of interest in ability grouping as society demanded that talented students be identified and trained in mathematics and science. During the same period of time, school desegregation posed new problems resulting in widespread usage of standardized tests in order to identify students for placement in different learning tracks. Today, almost all of the public high schools are considered to be "comprehensive" high schools with different ability tracks or curricular programs for students.[2]

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[1]Glen Heathers, "Grouping," Encyclopedia of Educational Research, ed. R. E. Ebel (4th ed.; New York: Macmillan, 1969), p. 564.

[2]Miriam M. Bryan and Warren G. Findley, Ability grouping: 1970: Status, Impact, and Alternatives (Athens, Georgia: Center for Educational Improvement, 1971), p. 52.

Grouping practices have also continued to flourish in the elementary schools during the past two decades even though such practices remain controversial. Causing more attention to be paid to this issue is Public Law 94-142, which went into effect October 1, 1977. This law requires that school systems provide a free and equal educational opportunity for all children regardless of their ability or handicapping condition. While no one knows for sure what effect the implementation of this law will have upon related practices such as grouping and tracking of nonhandicapped children, the educational journals contain numerous projections and predictions.

The question concerning the merits of ability grouping has been marked by voluminous studies attempting to show the effects of this practice on student achievement. Conversely, the legality of grouping practices is an issue that has emerged only recently. As a result, very few formal studies have been conducted regarding the legality of tracking and grouping. Thus, the literature reviewed in this section will include general educational research findings related to ability grouping. No attempt is made to give an exhaustive review of the research that has been conducted on this subject. However, a summary of the key studies is included in order to provide information about the basic concepts of ability grouping so that the judicial discussions that follow can better be interpreted and understood.

For clarity, the related research is reported by topics as follows:

Ability Grouping and Academic Achievement
Ability Grouping and the Affective Domains
Ability Grouping and Pupil Segregation
Ability Grouping and Pupil Testing
Ability Grouping and Due Process
Ability Grouping and Equal Educational Opportunity

RESEARCH RELATED TO ABILITY GROUPING AND ACADEMIC ACHIEVEMENT

It has been contended by proponents of ability grouping that such practices increase academic achievement. Research findings often do not support this contention.[3]

Research studies related to ability grouping and student achievement are concentrated in two basic periods, 1920-1935 and 1955-1977. Many of the studies conducted during the 1920-1935 period concluded that ability grouping did have a favorable effect on student achievement; however, these studies were not conclusive, and many of them apparently contained research flaws.

In 1930, Miller and Otto reported that their review of research studies on ability grouping indicated that this practice was generally ineffective unless accompanied by proper changes in methods and content. Their overall conclusion was that ability grouping was neither advantageous or disadvantageous.[4]

In 1932, Billett reviewed 108 experimental or practical studies dealing with the effects of ability grouping on student achievement. Of these, he found that 104 studies were questionable because of research flaws such as uncontrolled variables. Of the four studies that were thoroughly controlled, two showed favorable results in achievement for

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[3]Joseph E. Bryson, "Education and Legal Aspects of Grouping Students," Missouri School Law Letter, IV, No. 3 (October, 1975), 1.

[4]W. S. Miller and H. J. Otto, "Analysis of Experimental Studies in Homogeneous Grouping," Journal of Educational Research, XXI (1930), 102.

ability grouped classes; one revealed doubtful results, and one indicated unfavorable results.[5]

A summary of research studies conducted between 1920 and 1930 and compiled by Ruth Ekstrom supports the conclusions of the two previously reported studies. Ekstrom examined thirty-three studies on ability grouping. She found that thirteen of these showed that students achieved significantly higher when placed in homogeneous groups, while fifteen of the studies revealed that grouping made no difference or was even detrimental to achievement. Five of the studies reflected mixed results. Ekstrom concluded that the research revealed no consistent pattern relative to the effectiveness of homogeneous grouping.[6]

In 1936, the National Society for the Study of Education devoted its yearbook to a review of ability grouping. Their conclusion was that:

> The results of ability grouping seem to depend less upon the fact of grouping itself than upon the philosophy behind the grouping, the accuracy with which grouping is made for the purposes intended, the differentiations in content, method, and speed, and the technique of the teacher---Experimental studies have in general been too piecemeal to afford a true evaluation of the results, but when attitudes, methods, and curricula are well-adapted to further adjustment of the school to the child, results, both objective and subjective, seem favorable to grouping.[7]

Even though some of the studies on ability grouping between 1920 and 1935 tended to show that this practice did increase achievement of some groups, the overall results were not conclusive.

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[5]R. O. Billett, The Administration and Supervision of Homogeneous Grouping (Columbia, Ohio: Ohio State University Press, 1932), p. 150.

[6]Ruth B. Ekstrom, Experimental Studies of Homogeneous Grouping (Princeton, New Jersey: Educational Testing Service, 1959), p. 25.

[7]Ethel L. Cornell, "Effects of Ability Grouping Determinable from Published Studies," The Ability Grouping of Pupils, ed. Guy M. Whipple (Bloomington, Illinois: Public School Publishing Company, 1936), p. 345.

Partially as a result of the inconclusiveness of research regarding achievement and ability grouping and other related issues, there was a marked decline in ability grouping between 1935 and 1955. This decline was also influenced by the progressive education proponents who maintained that grouping tended to stigmatize slow learners and make snobs out of the academically-able students.[8] Even though many schools continued the practice of ability grouping during these years, almost no research studies were conducted as to the effect of such practices on achievement.[9]

In the two decades since 1955, the practice of ability grouping has increased throughout the country. This increase has brought about a corresponding increase in research studies on the effects of grouping on achievement. In contrast to the research conclusions prior to 1955 concerning achievement, much of the recent research has concluded that ability grouping caused average and low-achieving students to lose ground instead of gaining.[10]

There are several assumptions that proponents of ability grouping make regarding its advantages relative to achievement. Goldberg, Passow, and Justman summarize these major assumptions in their comprehensive study on grouping published in 1966 as follows:

1. The average ability level of the class will prompt the teacher to adjust materials and methods and to set appropriate expectations and standards.

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[8]Heathers, op. cit., p. 564.

[9]H. J. Otto, "Elementary Education III. Organization and Administration," Encyclopedia of Educational Research, ed. Walter S. Monroe (2nd ed., New York: Macmillan, 1950), p. 378.

[10]Bryan and Findley, op. cit., p. 54.

2. In the absence of ability extremes, each pupil can receive more teacher time and attention.

3. When the class ability range is narrowed, the children are faced with more realistic criteria against which to measure themselves. They compete with their own peers and advance at their own rate when working with others of similar ability. The more capable students are challenged, while the less capable can work at a slower pace without becoming discouraged.

4. Class manageability and pupil and teacher comfort are enhanced with ability grouping. These, in turn, result in higher academic achievement.[11]

If formal research substantiated the above assumptions, most people probably would conclude that ability grouping is a good practice. However, the Goldberg-Passow-Justman study, as well as numerous comparable studies, does not substantiate these assumptions. The Goldberg study was based on research involving over 2500 fourth and fifth graders in New York City. These students were classified into five separate ability groups based on Otis-Alpha I.Q. scores obtained from the students in the fourth grade. The purpose of the study was to determine the effect of ability grouping on achievement, social and personal relations, and interests and attitudes of intermediate grade children.[12] Pretests and posttests were administered to determine the effect that ability grouping had on each of the above components. The conclusions of this study are as follows:

(1) Simply narrowing the ability range, without specifically designed variations in program for the several ability levels, does not result in consistently greater academic achievement for any group of pupils.[13]

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[11]Mirian L. Goldberg, Harry Passow, and Joseph Justman, The Effects of Ability Grouping (New York: Teachers College Press, 1966), p. 150.

[12]Ibid., p. 24. [13]Ibid., p. 161.

(2) In the lower ability levels, narrowing the ability range caused teachers to set lower expectation standards for students. Teachers generally tended to underestimate the capabilities of pupils in lower-track courses.[14]

(3) Most teachers found more success in teaching a given subject to several ability levels simultaneously than in teaching all subjects to narrow-range classes.[15]

(4) There was no evidence that special grouping procedures accompanied by special methods, materials, content, etc., would not be successful--that any pupil grouping should follow logically from the demands of the instructional program.[16]

The overall conclusion of the Goldberg-Passow-Justman study is that:

> Ability grouping is inherently neither good nor bad. It is neutral. Its value depends upon the way in which it is used. Where it is used without close examination of the specific learning needs of various pupils and without the recognition that it must follow the demands of carefully planned variations in curriculum, grouping can be, at best, ineffective, at worst, harmful. It can become harmful when it lulls teachers and parents into believing that because there is grouping, the school is providing differentiated education for pupils of varying degrees of ability, when in reality that is not the case--when it leads teachers to underestimate the learning capacities of pupils at the lower ability levels--when it is inflexible and does not provide channels for moving children from lower to higher groups.[17]

The conclusions of the Goldberg-Passow-Justman study have been substantiated by several other studies since 1966. The majority of the studies revealed that students of low ability seldom show any signifi-

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[14]Ibid., p. 165. [15]Ibid., p. 163. [16]Ibid., p. 164.

[17]Ibid., p. 168.

cant achievement gains as a result of being placed in low groups.[18] An international study, edited by Alfred Yates, concluded that grouping children by ability actually widens the gulf between able and less able children; that grouping seems to sustain the differences on which it is based; that children are obliging creatures who are inclined to produce the standard of work that their elders regard as appropriate; and that top groups also suffer because of anxiety and inflated egos.[19]

One of the most comprehensive summaries of the studies related to the results of ability grouping was done by Miriam M. Bryan and Warren G. Findley in 1970. Even though this is a comprehensive review of over fifty years of research, the major issue of whether ability grouping results in better conditions for teaching and learning still is not satisfactorily answered as is evidenced by this summary statement concerning academic achievement:

> Briefly, we find that ability grouping. . .shows no consistent positive value for helping students generally, or particular groups of students, to learn better. Taking all studies into account, the balance of findings is chiefly of no strong effect, either favorable or unfavorable. Among the studies showing significant effects the slight preponderance of evidence showing the practice favorable for the learning of high ability students is more than offset by evidence of unfavorable effects on the learning of average and low ability groups, particularly the latter. Finally, those instances of special benefit under ability grouping have generally

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[18]Leonard A. Marascuila and Margellen McSweeney, "Tracking and Minority Student Attitudes and Performance," Urban Education (January, 1972), p. 306; see also, Leon J. Lefkowitz, "Ability Grouping: De Facto Segregation in the Classroom," The Clearing House (January, 1972), p. 294.

[19]Alfred Yates, ed., Grouping in Education (New York: John Wiley and Sons, 1966), p. 37.

involved substantial modification of materials and methods, which may well be the influential factors wholly apart from grouping.[20]

Even when studies have shown that ability grouping has resulted in increased academic achievement for some groups, the reasons for the increased performance may be related to variables other than ability grouping. The 1968 National Education Association's Research Summary on Ability Grouping reported that variables other than organizational patterns, which could be explanations for academic gains, include the modification of objectives, modified curricular organization, new teaching materials and different teaching methods.[21] According to a review by Bryan and Findley, at least eight other studies have attributed academic gains of ability groups to variables similar to those listed in the National Education Association study.[22]

Thus, the research studies on ability grouping do not appear to support the argument used by proponents of this practice concerning increased academic achievement. The research reveals no clear or consistent effects on student achievement when total school populations are compared.

ABILITY GROUPING AND THE AFFECTIVE DOMAINS

There has been a limited amount of research completed regarding the effects of ability grouping on the affective development of students.

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[20]Bryan and Findley, op. cit., p. 54.

[21]National Education Association, Ability Grouping--Research Summary (Washington, D.C.: National Education Association, 1968), p. 1.

[22]Bryan and Findley, op. cit., pp. 44-48.

The probable reason for the limited research is the difficulty of assessing growth in this area. Much of the research completed to this point, however, seems to suggest that ability grouping may adversely affect self-concept, attitudes, and personality traits of the students, particularly those in the low groups. Bryan and Findley reviewed a number of studies on this topic and reached this conclusion:

> The findings regarding the impact of ability grouping on the affective development of children are essentially unfavorable. Whatever the practice does to build or inflate the egos of children in the high groups is overbalanced by evidence of unfavorable effects of stigmatizing average and low groups as inferior and incapable of learning.[23]

Proponents of ability grouping have contended that low-achieving students can experience success when grouped according to their ability and thus improve their self-concepts. Research evidence, while inconclusive on this point, does not appear to support this contention. For example, in a 1966 study, Borg found that both high and low ability students showed a loss of self-esteem when they were grouped according to ability.[24] Yates concluded that no matter what labels are attached to "streamed" classes, the children involved quickly grasp the significance of the procedure and those who are assigned to the lower groups develop feelings of inferiority. When this occurs, motivation suffers and progress is hindered.[25] Yates stated that the achievement gap between students in the low groups and those in the high groups widens as the

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[23]Ibid., p. 40.

[24]Walter R. Borg, Ability Grouping in the Public Schools (Madison, Wisconsin: Dembar Educational Research Services, 1967), p. 92.

[25]Yates, op. cit., p. 37.

years go by. Yates maintained that this is caused by discouragement and by the tendency of many schools to assign the most effective teachers to the higher groups.[26]

Conversely, Marascuila and McSweeney conducted a study in 1968 relating both achievement and self-concept to ability grouping. Their study found no significant differences in student self-images as a result of ability grouping.[27] Likewise, Dyson reported a 1967 study which concluded that ability grouping alone did not appear to have a significant effect on self-concepts.[28] While the Goldberg-Passow-Justman study did not conclude that the practice of ability grouping enhances self-concept, it did find that is had no adverse effect on the self-concepts of any of the groups in the study.[29]

Even though the research evidence is not conclusive regarding the effects of ability grouping on student self-concepts, the studies reviewed do indicate that students in the low tracks or groups generally have low self-concepts. Whether this is directly attributable to ability grouping practices is a continuing research question.

In addition to the negative self-concepts of the students in the low groups, there is a tendency for these students to become discouraged by school. Heathers concluded that one reason for this is the fact

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[26]Ibid.

[27]Marascuila and McSweeney, op. cit., p. 315.

[28]Ernest Dyson, "A Study of Ability Grouping and the Self-Concept," The Journal of Educational Research, LX, No. 9, (May-June, 1967), 403.

[29]Goldberg, Passow, and Justman, op. cit., p. 170.

that teachers tend to stress basic skill drills with these students and omit independent and creative projects.[30] Other studies have revealed that the most creative teachers often are assigned to the high groups. A 1968 National Education Association research report indicated that only 3 percent of the teachers surveyed listed the low-ability group as the ability group they preferred to teach. This study reported that teachers generally are promoted from the low groups, thereby ensuring that the low groups are taught by the inexperienced teachers.[31] Thus, the attitudes that students have toward school may be indirectly related to the practice of ability grouping.

One point that does appear to be consistent in the research regarding the affective domain is the "self-fulfilling prophecy" concept. Rosenthal and Jacobson conducted a study in the 1960's which showed that randomly selected students tended to achieve according to teacher expectations regardless of their ability.[32] This study did not test the reverse effect directly; nevertheless, it showed that the expectancy phenomenon does have a powerful effect upon the classroom environment and on students' views of themselves as potential learners.[33]

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[30]Heathers, op. cit., p. 566.

[31]"Ability Grouping: Teacher Opinion Poll," National Education Association Journal, LVII (February, 1968), 53.

[32]Robert Rosenthal and Lenore Jacobson, Pygmalion in the Classroom (New York: Holt, Reinhart Company, 1968), p. 75.

[33]Jeremy D. Finn, "Expectations and the Educational Environment," Review of Educational Research, XLII (Summer 1972), 387-390.

ABILITY GROUPING AND ETHNIC AND SOCIO-ECONOMIC SEGREGATION

Even though the majority of the court cases related to grouping have been centered around the question of resegregation, very few research studies have addressed themselves to the specific questions of how ability grouping practices affect ethnic and socio-economic segregation. Among those studies completed, the data reflects a high degree of correlation between ethnic origin and socio-economic status and performance on standardized ability and achievement tests. Therefore, when ability grouping practices are based on standardized written tests, one can predict with a high degree of certainty that a high percentage of non-white and low socio-economic students will be found in the low ability groups.[34]

A factor which tends to compound this problem is the fact that many school systems, particularly those in metropolitan areas, continue to have a disproportionate concentration of non-white students within individual schools, a concentration higher than the percentage of non-whites in the total system. As a result of segregated housing patterns, this situation is not likely to change unless the emotionally-charged practice of cross-busing is expanded.

Even in school systems where organizational plans and busing patterns have given the schools racial balance, the practice of ability grouping often has resulted in resegregating students along ethnic and socio-economic lines.[35] Research reports during the sixties began

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[34]Dominick Esposita, "Homogeneous and Heterogeneous Ability Grouping," Review of Educational Research, XLIII (Spring, 1973), 169.

[35]U. S. Commission on Civil Rights, Racial Isolation in the Public Schools (Washington, D. C.: Government Printing Office, 1968), p. 11.

noting the possibility that ability grouping could be a contributing factor to racial and social isolation within the schools.[36] Many educators, however, continued to believe that ability grouping was the best organization for instruction. Some school officials and school boards, no doubt, saw ability grouping as a way to ease the pains of school integration in communities where there was opposition to integration. By using the practice of ability grouping, school boards could reassure the white parents that the better students would continue to receive quality education and that standards would not be lowered in the high ability classes.[37] Some educators who had consistently supported the unitary school concept found themselves in a dilemma by continuing to support the practice of ability grouping, which had the effect of resegregating the schools.[38]

The highly publicized Coleman Report, which was published in 1966, added to the debate concerning ability grouping, but did very little to settle any of the issues. The report did confirm the widespread use of ability grouping. It also confirmed that the practice of ability grouping was more often found where there were greater concentrations of minority students. Throughout the nation, the Coleman report showed that 32 percent of all black children were assigned to the lowest track or classes compared to 24 percent of white children.[39]

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[36]John McPortland, "The Relative Influence of School and of Classroom Desegregation on the Academic Achievement of Ninth Grade Negro Students," Journal of Social Issues, XXV, No. 3 (1969), 101-102.

[37]Bryan and Findley, op. cit., p. 43.

[38]Ibid.

[39]James S. Coleman, and others, Equality of Educational Opportunity, Vol. 1, (Washington: Government Printing Office, 1966), pp. 110-111.

Even though the Coleman report was critical of the practice of ability grouping, it did not conclude that this practice was a significant cause of low pupil performance. Instead, the report concluded that ability grouping had very little effect on achievement when finances and other external factors were controlled.[40]

In addition to being involved in the continuing debate concerning the educational and legal validity of ability grouping, school officials and board members also have had to contend with the guidelines of the Department of Health, Education, and Welfare. Each year school systems that receive federal aid are required to submit to the Regional Office of Health, Education, and Welfare enrollment data by race for sample classes taught in the system.[41] This data is reviewed by the Regional Office of Civil Rights in order to determine if schools are using grouping practices which result in racially-identifiable classes. These are defined by the Office of Civil Rights as classes in which the racial composition varies more than plus or minus 20 percent from the racial composition of the grade at that school.[42] A review of the 1973-74 data collected by the Atlanta Regional Office of HEW revealed that two out of every three school systems in the seven-state region had racially identifiable classes and that the majority of these systems used ability grouping as a basis for placing the students in classes.[43]

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[40]Ibid., p. 116.

[41]A Summary of Federal Aid Under Emergency School Aid Act (Washington, D. C.: U. S. Government Printing Office, November 13, 1975), p. 2.

[42]Ibid.

[43]Roger Mills and Miriam M. Bryan, Testing, Grouping: The New Segregation in Southern Schools? (Atlanta, Georgia: The Southern Regional Council, 1976), p. 45.

The above data only showed correlations between school systems which use ability grouping and which reported one or more racially identifiable classrooms within the system. Other studies, however, have shown a positive correlation between racially identifiable classes and ability grouping practices.[44] It is this correlation that has resulted in numerous litigations as the courts have sought to determine if the practice of ability grouping is a legitimate educational practice or simply a ploy used by school officials to resegregate the schools. The major court cases involving this issue are discussed in the next section of this study.

Finn reports that a number of studies concerning the relationship between ability grouping and ethnic and/or socio-economic isolation have concluded that this practice often results in a self-fulfilling prophecy. Non-white and low socio-economic students who consistently comprise the bulk of students in the low groups often tailor their own efforts to conform to the expected norms of the group.[45] Studies also have shown that students in the low groups often do not receive equal educational opportunities for growth due to the fact that their curriculum is restricted to drill in the fundamental skills areas. Many of the creative and independent learning activities are available only to the high ability groups. When this happens, ability grouping by design, as opposed to intent, discriminates against non-white children and the children of low socio-economic status.[46]

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[44]McPortland, op. cit., pp. 93-95.

[45]Finn, op. cit., pp. 387-398.

[46]Esposita, op. cit., p. 171.

Much has been written on the subject of the use of intelligence tests related to ability grouping. Many of the court cases which are related to the denial of due process and/or equal protection for non-white and low socio-economic students were initiated because standardized tests had been misused.[47]

In summary, it appears that most of the studies concerning the relationship between ability grouping and ethnic and/or socio-economic segregation have yielded similar results: the widespread use of ability grouping does perpetuate the separation of children along ethnic and socio-economic lines, and the concept of "equal educational opportunity" is not realized due to the limited educational opportunities available for many children in the lower classes or tracks.[48] A growing body of literature on schooling and learning indicates that peer interaction has a great impact upon individual students. If this is true, then adverse effects can be expected because of the isolation of certain groups resulting from ability grouping.[49]

ABILITY GROUPING AND THE USE OF STANDARDIZED TESTS

Introduction

Testing is big business in the American education system. It is estimated that over 300 million dollars are spent annually in testing

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[47]Thomas E. Shea, "The Educational Perspective of the Legality of Intelligence and Ability Grouping," Journal of Law and Education, VI, No. 2 (April, 1977), 137-138.

[48]Esposita, op. cit., p. 171.

[49]Bryan and Findley, op. cit., p. 45.

public school students. Forty-six million students take an average of three standardized tests each year.[50] The results of these tests are used by school officials for a variety of purposes: promotion, graduation, accountability, curriculum revision, planning remedial education programs, grouping and/or tracking. The purpose of this part of the study is to set the stage for the analysis of the judicial questions raised in the numerous court cases involving the use of standardized tests for assigning students to groups and/or tracks.

Ability grouping and intelligence testing are practices developed by educators supposedly to increase the effectiveness of the public schools. Each of these concepts has far-reaching implications for society and for individuals which can carry over into the legal domain.[51]

Since local boards of education have the power to assign students to classes, they also have the power to determine what criteria, including the use of standardized tests, to use in making the assignments. During recent years, the use of tests for any reason within the schools has come under severe attacks from practicing educators, social critics, and civil rights groups. Most of these attacks have been related to the practice of using tests to label and/or classify students for placement in ability groups, tracks, or other special programs. Questions

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[50]L. Wendell Rivers, and others, "Mosiac of Labels for Black Children," Journal of Afro-American Issues, III, No. 1 (Winter, 1975), 63-64.

[51]Shea, op. cit., p. 137.

concerning the use of standardized tests usually are addressed to the areas of test validity and test bias.[52]

Historical Perspective

According to Nolte, the first achievement test used by schools was a spelling scale developed by J. M. Rice in 1894. Around 1900, the research of Binet, Thorndike, and Terman became popular with government officials who were seeking ways to scientifically test immigrants to determine which countries were sending the more "intelligent" immigrants to the United States.[53]

The intelligence testing movement was enhanced tremendously by World War I with the administration of the Army Alpha and Beta tests to thousands of service men. As intelligence testing gained popularity outside the schools, it was natural that the use of intelligence tests soon gained prominence in the public schools. The twenties produced a corresponding increase in homogeneous grouping based on test results. At least seventy percent of the city school systems reportedly were using some form of ability grouping by the late 1920's.[54]

Criticism by proponents of progressive education of the use of ability grouping led to a lessening of emphasis on standardized tests during the period from 1930 to 1950. During this period, educators

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[52]Paul Weckstein, "Legal Challenges to Educational Testing Practices," Classification Materials, Center for Law and Education (Cambridge, Massachusetts: Harvard University Press, 1973), p. 6.

[53]Chester M. Nolte, School Testing, Grouping and the Law, U. S. Educational Resources Information Center, ERIC Document ED 113 017, November, 1975, p. 5.

[54]Ibid., p. 6.

continued to debate the influence of environmental factors on intelligence quotients. The theorists who advocated that intelligence was largely caused by heredity were overshadowed during this period by the environmentalists. Eells stated that while environmentalists and hereditarians shared the view that there were genuine differences in basic intelligence between children from high-status backgrounds and children from low-status backgrounds, they differed on the explanations for these differences. Eells further stated that test scores might be reflections of cultural or class bias in the test materials themselves and not a basic difference in the real abilities of children from different backgrounds.[55]

Over-dependency on intelligence test scores continued to be the subject of attacks by educators who believed that environment was the dominant factor in determining what score a child would make on such tests. This, in turn, caused school officials to begin to look at other factors when making decisions concerning student assignments.[56]

After 1954, school officials had another major problem to contend with. Faced with the problem of desegregation, some school systems sought to circumvent the law by developing grouping plans designed to soften the impact of racial integration. By developing and implementing ability grouping and tracking programs, school boards felt they could

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[55]Kenneth Eells, "Some Implications for School Practice of the Chicago Studies of Cultural Bias in Intelligence Tests," Harvard Education Review, XXIII (Fall, 1953), 290.

[56]Richard L. Blanton, "Historical Perspectives on Classification of Mental Retardation," Issues in Classification of Children, ed. Nicholas Hobbs, Vol. I (San Francisco: Jossey-Boss Publishers, 1975), pp. 186-189.

reassure the white parents that their children would continue to receive a "quality" education program in the integrated schools. Most of these grouping plans were based on student scores on standardized ability and/or achievement tests. The increasing evidence that many of the tests being used contained culturally biased items caused civil rights leaders to ask that the courts order schools to cease using such standardized tests for grouping purposes.[57]

Educators themselves are still divided concerning the use of standardized intelligence and achievement tests, particularly as their use relates to labeling and classifying students. In 1972, for example, the National Education Association and the National Association of Elementary Principals passed resolutions asking that school-wide testing programs be stopped immediately.[58] Even though virtually every suit filed by minority parents concerning test abuse has resulted in decisions by the courts to prohibit the use of standardized tests for placement and grouping, and even though many educators apparently are opposed to such uses of test results, the testing movement continues to gain momentum and continues to be used for grouping and placement purposes.[59]

One of the major reasons for the continued popularity of standardized testing during the past decade has been the accountability movement, which led educators to feel pressured to provide the public

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[57]L. Wendell Rivers, and others, op. cit., p. 238.

[58]Terry Herndon, "Testing: Is It Worth the Costs?" North Carolina Education, VIII, No. 2 (October, 1977), 9-10.

[59]L. Wendell Rivers, and others, op. cit., p. 240.

with tangible proof that the school systems are worthy of the public's continued support.[60] Closely associated with this is the minimum competency movement which requires students to exhibit competency in certain basic skill areas before they can receive a high school diploma. In each of the above cases, standardized tests are the most convenient tools available to educators.[61]

Issues in Testing

In order to place the subject of standardized testing in the legal perspective of this study, it is necessary to review some of the educational issues currently being raised by proponents and critics of standardized testing. Some of the literature indicates that educational issues once considered to be off limits to the courts may become subjects for litigation in the future.[62]

Group intelligence testing is one of the most common forms of testing used in the public schools. It is estimated that almost every person who goes through the public school system is subjected to at least one written, group intelligence test.[63] In addition to intelligence tests, reading readiness tests often are given very early in the school life of children. Reading groups, ability-grouped classes and/or tracks are formed based on the results of these tests.[64]

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[60]Shea, op. cit., p. 60.

[61]Mills and Bryan, op. cit., pp. 8-9.

[62]Paul Tractenberg and Elaine Jacoby, Pupil Testing: A Legal View, U. S. Educational Resources Information Center, ERIC Document ED 102 211, December, 1974, p. 2.

[63]Ibid., p. 3.

[64]Ibid., p. 8.

Opponents of group intelligence tests contend that the results of these tests, given in the early years of school, often determine the type of education a child will receive throughout his entire school career. When children score poorly on these tests and are placed in "slow" groups, they often are not expected to be able to perform well academically and thus become trapped in a vicious self-fulfilling prophecy circle. Numerous court cases, including the landmark case of Hobson v. Hansen, have included the allegation of discrimination against minority students because of the way the results of certain standardized tests were used by school officials in assigning students to special groups or tracks.[65]

Another common form of testing that is used by practically every public school is the standardized achievement test. These tests, which are designed to measure how much a student has learned in a specific subject, often are used in conjunction with intelligence tests to assign pupils to instructional groups or tracks. While the courts have been reluctant to attack the concept of achievement testing, they have addressed themselves to issues of discrimination resulting from the use of such tests for grouping and tracking decisions.[66] For example, in Moses v. Washington Parrish School District, the court ruled that the school system could not use the achievement test results from a reading test as the basis for grouping students in all subjects.[67]

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[65]Hobson v. Hansen, 269 F. Supp., pp. 512-513.

[66]Tractenberg, op. cit., p. 12.

[67]Moses v. Washington Parrish School District, 330 F. Supp. p. 1343.

A third type of testing that is widely used by the public schools is the individualized intelligence test. These tests are administered to students upon referral whenever mental retardation or other associated learning and behavior problems are suspected. The results of such tests are also used as one of the criteria for assigning students to advanced academic classes or for placement in a class for the mentally retarded.[68]

Individualized intelligence tests eliminate some of the problems associated with group tests in that the results are not determined by how well a child reads or how many cultural experiences he has had.[69] Nevertheless, numerous court cases have resulted from the placement of a child in a special education class or from excluding a child from school based on the results of individual intelligence tests. Issues associated with individual intelligence tests include denial of due process before the testing and placement occur and administering the test in a language that is not the child's primary language.[70] Some of the major court cases that address these issues will be discussed in the next section of this study. Among these are Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania,[71] (P A R C),

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[68]Tractenberg, op. cit., p. 4.

[69]Shea, op. cit., p. 145.

[70]Nolte, op. cit., p. 14.

[71]Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania (P A R C), 334 F. Supp. 1257 (D. C. E. D. Pa. 1971).

Mills v. Board of Education of District of Columbia,[72] and Diana v. State Board of Education.[73]

Legal Challenges

As indicated previously, when the debate concerning the use of test results moves from the academic arena into the courtroom, the key issue generally is not the validity of the tests themselves but rather whether or not the testing results in discrimination of some kind.[74]

When the courts have become involved with issues relating to tests, they have sometimes relied on the testimony of experts in the field of testing. These experts have arrived at a number of conclusions regarding standardized tests and the use of test results:

(1) Excessive reliance on intelligence test scores can result in giving a child an incorrect label which can follow him throughout his life.[75]

(2) Group intelligence tests are not infallible because they can only test the narrow ranges of abilities which lend themselves to standardized testing methods.[76]

(3) Most of the group intelligence tests used by schools have been standardized for a normative population; thus, children from low

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[72]Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972).

[73]Diana v. State Board of Education, C. 70 37 RFT (N.D. Cal., Feb. 3, 1970) Clearinghouse No. 2859.

[74]Hobson v. Hansen, 269 F. Supp. 514 (D.D.C., 1967).

[75]Shea, op. cit., p. 145.

[76]Ibid., p. 140.

socio-economic homes predictably will score lower on such tests than will students from average and above average socio-economic homes.[77]

(4) Standardized intelligence tests are not "culture-free" tests and therefore measure present ability rather than potential ability.[78]

(5) Standardized intelligence tests are in reality vocabulary tests which contain many items not familiar to many of the non-white students; thus these tests are not valid measures of intellectual capacity or for predicting future success.[79]

(6) Grouping for all subjects based on obtained scores on a reading achievement test is a misuse of test data; there is no direct correlation between achievement scores on reading and ability in math or some other skill area.[80]

(7) There are many variables which affect the student's scores on a particular test--the physical environment of the testing room, the attitude of the examiner toward the procedure, the physical and emotional health of the student, and student's motivation for taking the test. Since any one of these variables can cause the student to score lower on the test, school officials should use additional criteria when making decisions regarding placement.[81]

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[77]Ibid., p. 141.

[78]Herbert Goldstein, and others "Schools," Issues In The Classification of Children, ed. Nicholas Hobbs, Vol. II (San Francisco: Jossey-Boss Publishers, 1975), p. 242.

[79]Tractenberg, op. cit., p. 12.

[80]Ibid.

[81]Mills and Bryan, op. cit., p. 14.

Whenever there is evidence of discrimination as a result of a testing program and the issue is brought to the attention of the courts, school officials often are required to demonstrate the rationality of the test procedure and the predictive validity of the tests; i.e., how well the future performance of the student compares to the test results.[82] Since most tests are standardized by using white middle-class norms, critics claim that this makes the test invalid in terms of predicting future success for non-white and low socio-economic whites.[83]

Even when it can be shown that a certain test is valid in terms of predictability and content, there may still be challenges which have legal implications. Several court cases have concluded that testing cannot be used as a basis for grouping or placement in recently desegregated schools, regardless of the issues of test validity.[84] Also, when there is a history of past educational discrimination, the courts have ruled that testing cannot be used for purposes of grouping students.[85] In at least one case, the court has ruled that the low test scores are indicative of the fact that the school system had denied equal educational opportunities for certain groups by not providing an adequate bilingual and bicultural educational program.[86]

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[82]Ibid., pp. 9-10.

[83]Weckstein, op. cit., p. 189.

[84]Singleton v. Jackson, 419 F 2d. 1211 (Fifth Cir. 1970); see also United States v. Tunica County School District, 421 F. 2d 1236 (Fifth Cir. 1970); also United States v. Lincoln County Board of Education, 301 F. Supp. 1024 (S.D. GA. 1969).

[85]Moses v. Washington Parish School Board, 330 F. Supp. 1340 (E.D. LA. 1971).

[86]Serna v. Portales Municipal Schools 351 F. Supp. 1279 (D.N.M. 1972).

In addition to the challenges related to test validity, the courts have also been asked to examine certain psychometric considerations such as reliability, objectivity, standardization, and the logistics of test administration.[87]

Each of the above issues has been addressed by the various courts within the past few years. An analysis of cases related to these issues is contained in chapter four.

ABILITY GROUPING, CLASSIFICATION AND DUE PROCESS

Overview

Numerous court cases involving classification of students for exclusion from school or for assignments to special education classes include the allegation that students were denied due process of law by school officials who made the decisions. The Fourteenth Amendment to the Constitution prohibits any state from depriving any individual of life, liberty, or property without due process of the law.[88] The question of whether or not ability grouping falls under one of the protected categories has not been settled by the courts as of this date.

Legal Precedents

A legal principle that has been firmly established by the courts is that a child is entitled to minimal fair procedures in the decision-making process before he can be stigmatized by public officials. This

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[87]Wickenshien, op. cit., p. 192.

[88]U. S. Constitution. amend. XIV, sec. 1.

principle was established by the U. S. Supreme Court in Wisconsin v. Constantineau.[89] While this case did not involve schools, the legal precedent established in it has been used by various courts in school-related cases including the landmark case, P A R C v. Commonwealth of Pennsylvania.[90]

At one time, school officials could exclude a child from school for almost any reason and without any formal procedures. Today, however, landmark Supreme Court decisions and state and federal laws require that schools provide a hearing procedure for any child before he can be excluded from school for any reason.[91]

The principle of due process for students was firmly established by the United States Supreme Court in Goss v. Lopez.[92] This decision established the fact that public education, once established by the state, becomes a property right which is protected by the Constitution and that school officials cannot exclude a student, even for a short period of time without a hearing.

Tracking and Due Process

Whether or not students should be afforded due process before being assigned to low groups or tracks continues to be a debatable issue among educators. However, while numerous articles have been published dealing with due process for students in areas such as suspension,

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[89]Wisconsin v. Constantineau, 400 U. S. 433 (1971).

[90]P A R C v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E. D. Pa., 1971.

[91]Goldberg v. Kelly, 397 U. S. 254 (1970).

[92]Goss v. Lopez, 419 U. S. 565 (1975).

corporal punishment, and classification for placement in special education classes, a search of recent literature reveals very little relating specifically to the issue of due process and ability grouping.

Nolte contends that the practice of tracking or ability grouping does fall within the protected property rights category because the group or track in which students are placed has much influence on their future success. Nolte maintains that students should be accorded minimal due process rights before they are assigned to a particular track or group and that school officials who make the assignments must be able to prove that the assignments are in the best interest of the students.[93]

Diamond suggests that since the purpose of education is to benefit the child, it is not too much to require schools to evaluate the benefit of their specific educational assignments and the effectiveness of their grouping plans. He contends that this required evaluation would meet the requirements of minimal procedural due process and would at least insure that students who are misclassified, or who are placed in educational programs which do not benefit them, would be reclassified and given a more appropriate educational program.[94]

In the landmark case involving tracking, Hobson v. Hansen, Judge Skelly Wright stated that there must be a reasonable relationship between the action and the objective the school had for initiating

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[93]Chester M. Nolte, Due Process and Its Historical Development in Education, U. S. Educational Resources Information Center, ERIC Document ED 088 186 (April, 1974), p. 14.

[94]Paul R. Diamond, "The Law of School Classification," Classification Materials, Center for Law and Education (Cambridge, Massachusetts: Harvard University Press, 1973), p. 6.

the action.[95] If the school system is unable to show a direct relationship between a particular tracking assignment for a student and a better educational opportunity for the student, it could be argued that the student has been denied substantive due process.[96] For example, if students are assigned to tracks or vocational educational programs which train them for jobs that no longer exist, such assignments could be legally challenged on the issue of denial of substantive due process. Since the stated purpose for schooling is to provide the student with a skill or a competitive advantage, several observers contend that the placement of a student in a particular group or track must be directly related to the attainment of a specific skill.[97]

In a related attack on the practice of tracking and grouping, Diamond suggests that this practice may even be ultra vires, i.e., beyond the power of the school board.[98] Any action which is not specifically authorized by statute or cannot be fairly implied from specific statutory authority is referred to as ultra vires.[99]

Diamond contends that the non-academic goals of the schooling process, such as building good citizens and learning about each other from each other, are worthy goals which the state requires schools to attempt to achieve. He further contends that most tracking plans fundamentally subvert these non-academic goals as this summary statement indicates:

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[96]Merle McClung, "The Problems of the Due Process Exclusion," Classification Materials, Center for Law and Education (Cambridge, Massachusetts: Harvard University Press, 1973), p. 155.

[97]Diamond, op. cit., pp. 30-31.

[98]Ibid.

[99]McClung, op. cit., p. 159.

> In theory, tracking represents an "academic" goal, an attempt to keep children's learning from being hindered through association with others of different abilities and learning backgrounds; in practice, tracking maximizes stigma and minimizes inschool contact between children of diverse races, social classes, sexes, abilities, and backgrounds. In sum, comprehensive tracking may be so in conflict with the explicit authority and "nonacademic" purposes underlying delegation of power to state and local boards as to be ultra-vires.[100]

This theory, while interesting, apparently has not been considered by the courts. Instead, the courts repeatedly have stated that the internal operation of the schools is not a function of the courts. They have maintained this position even though numerous attempts have been made to get them to become involved with the day-to-day operation of the schools. Unless the courts determine that a specific right has been violated, they refuse to rule on the educational wisdom of any specific organizational plans, including grouping and tracking.

Any classification procedure that has the effect of systematically and disproportionately singling out a minority racial or national origin group for exclusion or for placement in special education classes may be labeled as "suspect classification."[101] Some observers maintain that tracking and grouping plans which result in the isolation of the poor and black in the lower tracks should be considered as "suspect classifications" and thus be protected under the due process clause.[102]

Some of the literature concludes that the same standards regarding substantive due process should be applied to school assignments in low

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[100]Diamond, op. cit., p. 31.

[101]Ibid.

[102]Ibid.

groups or low tracks.[103] If the assignment causes a stigma to be attached to the student, if the assignment is unreasonable, arbitrary, or capricious, or if the school can show no reasonable relationship between the assignment and the objective of providing a better educational opportunity for the student, it could be argued that substantive due process has been denied the student.[104]

Classification for Placement into Special Education Programs

Prior to recent landmark court decisions regarding due process for students, schools could fairly easily exclude children from school or assign them to special education classes without any formal hearings. As a result of the court decisions and as a result of the passage and implementation of P. L. 94-142, no child may be excluded from school or labeled and assigned to a special education class without first being granted all appropriate due process procedures.[105] This law was passed by Congress in 1975 as a result of continuous pressure by groups of concerned parents who wanted to ensure that the rights of handicapped children were protected and who wanted to ensure that school systems received federal assistance for the education of the handicapped children.

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[103]Alan Abeson, Nancy Bolick, and Jayne Hass, "Due Process of Law: Background and Intent," Public Policy and the Education of Exceptional Children, ed. Frederick J. Weintraub, et al. (Reston, Virginia: Council for Exceptional Children, 1976), pp. 22-26.

[104]McClung, op. cit., p. 161.

[105]Mills v. D.C. Board of Education, 348 F. Supp. 866 (D.D.C. 1972); see also Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971); also, Education for All Handicapped Children Act of 1975 (20 U.S.C. 1411 et seq.).

Court decisions and research studies have confirmed that many children have been labeled as behavior problems and assigned to special classes because the regular classroom teacher did not want to deal with the difficult child. The fact that a much higher percentage of boys than girls is often found in special education classes implies that behavior problems apparently are dumped into special classes. Research indicates that the incidence of actual handicaps between boys and girls is virtually the same; since boys tend to "act out" more than do girls, more boys get transferred into special classes.[106]

Another group of children who are often misclassified are those who are transferred from regular classes to special classes on the basis of results obtained on culturally and linguistically biased tests. This type of misclassification has been successfully challenged in Stewart v. Phillips,[107] Diana v. California State Board of Education,[108] and in Larry P. v. Riles.[109]

The issue of due process as it relates to the classification of students for placement in special education classes or even exclusion from school has received much attention in the literature. McClung states that the standard in recent cases involving the question of substantive due process is usually not spelled out very carefully, but that one standard does appear to be firm: "punishment or other state

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[106]Jane R. Mercer, Labeling the Mentally Retarded (Berkeley, California: University of California Press, 1973), pp. 96-98.

[107]Stewart v. Phillips, C.A. No. 70--1199--F (D. Mass., 1970).

[108]Diana v. State Board of Education, op. cit., p. 70.

[109]Larry P. v. Riles, 343 F. Supp. 1306 (D.C.N.D. Cal., 1972).

action must be reasonably related to the purported objective of the action."[110] In classification cases involving placement in special classes or exclusion from school, the school system must be able to establish a reasonable relationship between the proposed action and the stated purpose of the action. If it cannot do this, a student could initiate a suit on the issue of denial of substantive due process rights.[111] Again, it should be noted that this standard has not been applied by the courts to cases involving grouping and tracking--only to classification cases involving the placement or exclusion of special education students.

In addition to the standard of "reasonable relationship" between the action and the objective, another test for substantive due process is whether the state action is unreasonable, arbitrary, or capricious. Court cases involving the issue of substantive due process generally turn on the question of what is reasonable and what is unreasonable.[112] In Cook v. Edwards, the court determined that a school system's decision to permanently expel a student for arriving at school in an intoxicated condition was unreasonable in that the basic right of the student to obtain an education outweighed the school's interest in expelling the student as a deterrent to others.[113]

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[110]McClung, op. cit., p. 155.

[111]Diamond, op. cit., p. 34.

[112]McClung, op. cit., p. 157.

[113]Cook v. Edwards, 344 F. Supp. 307 (D.N.H. 1972).

ABILITY GROUPING AND EQUAL EDUCATIONAL OPPORTUNITY

It is assumed by many educators that ability grouping could be educationally justified if an accurate test for placement could be devised, if effective compensatory education could be provided, and if the grouping schemes remained flexible.[114] This assumption is not supported by the current critics of ability grouping. For example, Bryan and Findley contend that even if an ability grouping system could be devised that would avoid all of these shortcomings and had minorities proportionately represented in the high groups, the practice would still have harmful effects.[115] Other critics contend that grouping limits interaction and creates stigma--both having adverse academic effects on the students.[116]

Other arguments used by those who maintain that ability grouping does not provide for equal educational opportunities include the contention that ability grouping prevents exposure to diversity and that it gives inherent support to a sense of inferiority among members of the low groups and a false sense of superiority to those in the high groups.[117] Thus, critics of the practice of grouping contend that by creating group stereotypes, grouping schemes subvert that which they are

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[114]McClung, op. cit., p. 13.

[115]Bryan and Findley, op. cit., p. 3.

[116]James Rosenbaum, Making Inequality (New York: John Wiley and Sons, 1976), pp. 8-9.

[117]Ray Rist. "The Self-Fulfilling Prophecy in Ghetto Education," Harvard Education Review, XL (August, 1970), 104-105.

supposed to promote--providing for individual differences and ensuring equal educational opportunities for all students.[118]

Since many of the court cases reviewed in chapter four are based on the issue of denial of equal educational opportunities, it is appropriate that this chapter contain a review of some of the literature relating to this specific topic.

According to Shea, the two main functions of ability grouping and tracking are to provide compensatory education for those who need it and to provide continuing levels of education for children with permanent learning disabilities in order to maximize their education. When programs that are designed as temporary or compensatory ability grouping actually become continuing ability grouping, Shea contends that this is a misuse of the concept, and that if the operative level of children placed in compensatory ability grouping programs does not increase, it is questionable if such programs should be continued.[119]

In the forward to the final report of the Congressional Select Committee on Equal Education Opportunity, Chairman Walter Mondale stated:

> As we point out, there is much that is impressive and even remarkable about the American system of public education and what it has done, and is doing, to provide better opportunities for millions of Americans. But the plain fact is that full educational opportunities so fundamental to

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[118]McClung, op. cit., p. 15.

[119]Shea, op. cit., p. 147.

success in American life are denied to millions of American children who are born poor and nonwhite.[120]

The Congressional Committee on Equal Educational Opportunity concluded that tracking placements were often made on the basis of discipline problems, social status, and even race. They found that once a student was grouped or placed in a low track, he was likely to remain there for the duration of his school career. The Committee determined that educational inequality was the result of tracking due to lower teacher expectancies, limited curriculum, and negative self-concepts that the student developed as a result of being in the low group.[121]

Another issue in the equal educational opportunity debate involves the questions of upward mobility. Rothstein states that since only limited occupational privileges are available, tracking tends to preserve those privileges for the wealthy, for males, and for white students.[122] Rothstein suggests that tracking is a form of manipulation used by the school system to assign occupational roles. He supports this contention by pointing out that the upper tracks are more commonly composed of wealthy white males than are the lower tracks which are composed chiefly of blacks, poor whites, and females. The upper tracks lead to college and the better-paying jobs; the lower tracks lead to technical, blue collar, service or low-paying sales jobs.[123]

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[120]U. S. Senate, Select Committee on Equal Educational Opportunity, Toward Equal Educational Opportunity, S. Res. 359, February 19, 1970 (Washington: Government Printing Office, 1972) VII.

[121]Ibid., p. 135.

[122]Richard Rothstein, "Down the Up Staircase--Tracking in Schools," Education For A Culture in Crisis, ed. William L. Griffin and J. D. Marciano (New York: MSS Information Corp., 1972), p. 133.

[123]Ibid., p. 134.

While many educators have written articles concerning equal educational opportunity, only a few have attempted to define what equal educational opportunity means. The definitions most often given are: (1) educational input is equal; (2) the procedure or treatment is the same for all; and (3) the treatment is unequal in order to ensure equal educational outcomes. The third definition is perhaps the most controversial. In this context, this definition seems to mean schooling that produces similar results with different people.[124] If school systems use this definition, they would attempt to develop programs that would provide additional treatment for culturally deprived students so they can leave the system with equal ability to compete for employment opportunities.[125] A school that uses ability grouping and wants to ensure equal educational opportunity according to the equal outcome concept would have to show that the grouping contributes positively toward the goal of preparing culturally deprived students to compete equally for employment opportunities.

Some of the literature suggests that equal educational opportunity is not enhanced by ability grouping because of the seniority system used by many schools in assigning teachers. Schwebel cites a study showing that almost all of the teachers favor working with the honor groups, and that almost none want to work with the slow groups. As a result, the more experienced teachers almost always teach the superior groups.[126]

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[124]Clinton Collins, "The Concept of Equality in the Context of Educational Policies of Desegregation and Ability Grouping" (Unpublished Ph D dissertation, Indiana University, 1970), p. 43.

[125]Ibid., p. 44.

[126]Milton Schwebel, Who Can Be Educated? (New York: J. B. Lippincott, 1968), p. 134.

Glasser states that ability grouping is not an appropriate way to ensure equal educational opportunity for slow students. Even if the slow students receive passing grades, they see themselves as failures and many of them drop out. Glasser maintains that tracking not only does not work in the way it was intended, but that it works the opposite way by increasing the number of students who are failing.[127]

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[127]William Glasser, Schools Without Failure (New York: Harper and Row, 1969), p. 82.

Chapter III

LEGAL ASPECTS OF ACADEMIC AND ABILITY GROUPING

INTRODUCTION

While some educational issues regarding grouping and tracking are removed from any legal considerations, many issues once considered solely as educational questions have become legal concerns. Based on current trends of related court decisions, one can reasonably predict that other issues may become legal problems in future litigations. For example, the educational debate of whether or not grouping results in higher academic achievement than does non-grouping could become a legitimate question for the courts as they seek to determine if a student or class of students is receiving equal educational opportunities.

The majority of court cases involving issues related to ability grouping have been associated either directly or indirectly with Section I of the Fourteenth Amendment which prohibits any governmental body from depriving any person of life, liberty, or property without due process of law.[1] Generally, the plaintiffs alleged that certain practices of the school system or other governmental body resulted in a denial of equal protection of the laws, and/or that certain practices which deprived them of their constitutional rights were implemented without appropriate due process procedures. A review of court cases involving ability grouping and related educational practices indicates that the

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[1]U. S. Constitution, amend. XIV, sec. 1.

constitutional right most often alleged to have been abridged is the right to equal educational opportunity.

A well-established principle to remember when discussing legal issues is that each decision of the court relates only to the specific issues of the particular case. However, some decisions do tend to establish legal precedents or "case law" more than others. In making decisions, judges often depend heavily on rulings made by influential judges in other courts. In general, decisions from a Circuit Court of Appeals tend to establish legal precedent more than do decisions from a District Court. Because rulings of the United States Supreme Court are binding across the country, a decision by this court establishes the greatest possible precedent regarding a particular issue.[2]

Even though a legal precedent concerning a particular issue has been established, this does not prohibit an individual from pursuing his grievance in court.[3] A different set of facts may produce different results, even though the actual legal issues may be very similar to those already decided by the courts. This is the major reason for the difficulty in generalizing and drawing specific conclusions from legal research.

Decisions have been handed down by various courts within recent years regarding a number of constitutional questions related directly or indirectly to such educational issues as ability grouping, the use of standardized tests, and the identification and placement of students

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[2]Alan Abeson, "Litigation," Public Policy and the Education of Exceptional Children, ed. Frederick J. Weintraub (Reston, Virginia: The Council for Exceptional Children, 1976), p. 254.

[3]Ibid.

into classes for exceptional children. Constitutional questions involved in these cases include the denial of due process, racial discrimination, denial of equal protection of the law, and denial of equal educational opportunities. As a result of these court decisions, certain legal principles concerning ability grouping and related educational practices have evolved. These legal principles, which have been established on the basis of the Fourteenth Amendment, will be enumerated and discussed in this chapter.

LEGAL BASIS FOR COURT CASES REGARDING GROUPING, TRACKING, AND CLASSIFICATION

Overview

As was pointed out in the introduction to this chapter, the majority of the court cases involving issues related to grouping, tracking, and classification of students have been based on Section I of the Fourteenth Amendment which states:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.[4]

This amendment is now interpreted to mean that personal rights such as the right to have long hair and the right to be free from government efforts to brand the individual with a stigmatizing label are protected rights in the category of liberty. Property is interpreted as including intangible things such as public services, jobs, and public education.

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[4]U. S. Constitution, amend. XIV, sec. 1.

Before any level of government can take away any of these things, it must provide the individual with appropriate due process procedures.[5]

The portion of the Fourteenth Amendment regarding equal protection has been interpreted to mean that laws must not discriminate unfairly. Determining what constitutes unfair discrimination is a continuing problem for the courts.

While circumstances of various cases and backgrounds and philosophies of different judges make it difficult to predict the outcome in cases involving such issues as grouping, testing, tracking, and classifying students, it is a well-established fact that such practices do fall within the scope of the liberty and property rights guaranteed by the Fourteenth Amendment. Not only must school systems provide the student and his parents with due process procedures before taking away any rights, but individual students, and groups of students, must be afforded equal protection of the laws when initiating any practice which might tend to discriminate.[6]

If an individual or a group of individuals feel that they have been denied a protected right or that equal protection of the laws has not been afforded them, such individuals can seek relief in the courts. A review of court cases involving educational issues indicates that many cases have been initiated during the past two decades based on the allegations that due process was denied or that equal protection of the laws was not provided.

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[5]Joel M. Gora, Due Process of Law (Skokie, Illinois: National Textbook Company, 1977), p. 222.

[6]Martha M. McCarthy, "Is the Equal Protection Clause Still a Viable Tool for Effecting Educational Reform?" Journal of Law and Education, VI, No. 2 (April, 1977), 170.

Why the Courts are Involved in Educational Issues

Critics of the Federal Court System, as well as many average citizens, maintain that the courts have become extensively involved with pure educational issues which have very little to do with constitutional issues. However, a review of the courts' involvement in decisions related to grouping, tracking, and classifying students does not substantiate this conclusion. For example, Reutter and Hamilton have concluded that the courts have been more liberal in interpreting implied powers of local school boards in curricular and organizational matters than in any other area.[7]

Many of the decisions rendered by the federal courts in cases related to educational issues have included statements to the effect that courts do not wish to become involved with day-to-day operations of public schools or to engage in lengthy debates as to the wisdom of specific administrative practices. For example, in the one landmark case concerning tracking, Hobson v. Hansen, Judge J. Skelly Wright expressed regret that it had become necessary for the court to become involved in an area alien to its expertise. Judge Wright concluded, however, that when constitutional rights are challenged, it is often necessary for the judiciary to accept its responsibility in finding a solution.[8]

During the period from 1966 through 1971, the United States Justice Department and officials of Health, Education, and Welfare increased

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[7]Edmond E. Reutter and Robert R. Hamilton, The Law of Public Education (Mineola, New York: The Foundation Press, Inc., 1976), p. 128.

[8]Hobson v. Hansen, 269 F. Supp. 517 (Washington, D. C., 1967).

their efforts to get school systems throughout the South to eliminate all vestiges of dual school systems. Many school systems developed organizational and pupil assignment plans which caused students to be re-segregated within the individual schools. Numerous court cases were initiated by individuals and by the Justice Department as a result of these practices. Even though the courts consistently ruled against the use of grouping and assignment practices that resulted in racially identifiable classrooms, they continued to refrain from rendering any decision concerning the legality of the educational practices per se.

In 1970, the Fifth Circuit Court of Appeals was asked to rule on the legality of using the results of standardized tests for grouping students for instruction in the Jackson, Mississippi School System. The Court expressed its reluctance to become involved at all with the educational issue of grouping.[9] Instead, the Court ruled that recently desegregated schools could not use standardized tests for any purposes until they had operated as complete unitary schools for a period of time sufficient to overcome all vestiges of educational discrimination allegedly caused by previous segregation.[10] The implication was that the decision to use or not use standardized tests would be more properly made by the local school system. The right of the school system to make such decisions would not be abridged by the Court once the school system could assure the Court that the constitutional rights of the students were protected.[11]

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[9] Singleton v. Jackson Municipal School System, 419 F. 2d., p. 1219 (Fifth Cir., 1970).

[10] Ibid.

[11] Ibid., p. 1220.

Numerous other cases involving educational issues such as testing and classifying students for placement into special classes contained proclamations by various judges to the effect that the courts did not wish to become de facto boards of education. In cases where defendant school systems challenged the courts' involvement with educational issues, the courts generally took the position that they would gladly retire from the school business if school boards would face up to their responsibilities of affirmatively implementing practices that would guarantee protection of the constitutional rights of the students.[12]

Another case regarding ability grouping and testing which illustrates the reluctance of the courts to become involved with educational issues is the Moses v. Washington case in Louisiana.[13] In this case the Court of Appeals for the Fifth Circuit did take note of educational research regarding ability grouping and testing. However, its decision was based on the racial desegregation issue and not on educational issues. The Court implied that such educational questions could best be settled by the educators and that its only concern was whether or not such practices resulted in denial of any constitutional rights.[14]

During the period from around 1965 through 1971, several school systems were accused of attempting to circumvent the law requiring total unitary schools by using various grouping and tracking systems.

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[12]U. S. v. Choctaw Board of Education, 417 F. 2d. 838 (Fifth Cir., 1969); see also, Murray v. West Baton Rouge Parish School Board, 472 F. 2d. 440 (Fifth Cir., 1973); see also, U. S. v. Board of Education of Lincoln County, 301 F. Supp. 1024 (D. C. S. D. Georgia, 1969).

[13]Moses v. Washington Parish School Board, 456 F. 2d. 1285 (Fifth Cir., 1972).

[14]Ibid.

It appeared that some school systems used practices which school board members knew would not stand the legal tests with the expectation that the courts would order them to do certain things. In 1971, in the Swann v. Charlotte-Mecklenburg decision, the United States Supreme Court firmly established the legal principle that local school boards, and not the federal courts, have the duty and responsibility of assigning students and operating schools in a constitutionally acceptable manner.[15] No longer could school boards abdicate their responsibilities to the courts. Even though this decision implied that educational issues should not be settled by the courts, this decision made it clear that school systems must protect the constitutional rights of students and that if they failed to do so, the courts would intervene.[16]

Even though educational issues such as testing, placement of students, and special admissions requirements have been scrutinized more closely by the courts within recent years, the precedent of refraining from becoming involved in administrative issues has not been abridged. For example, in the 1975 McNeal v. Tate case, the Fifth Circuit Court of Appeals ruled that ability grouping or any other non-racial method of pupil assignment was not constitutionally forbidden and that educators were in a better position to appreciate the advantages and disadvantages of such practices than were the courts.[17] In another case

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[15] Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1, 91 (1971).

[16] Ibid.

[17] McNeal v. Tate County School District, 508 F. 2d. 1017 (Fifth Cir., 1975).

in the Fifth Circuit Court of Appeals in 1975, Morales v. Shannon, the Court determined that the school system's use of ability grouping did not constitute a violation of plaintiffs' rights because the plan was not intentionally discriminatory. The Court reiterated its earlier disclaimer to any debate regarding the educational wisdom of such practices.[18]

In a 1976 case not related to racial discrimination, Vorchheimer v. School District of Philadelphia, the Third Circuit Court of Appeals ruled that an admission standard for a special academic school based on gender was not unconstitutional.[19] The Court was careful not to debate the merits of such a plan, stating:

> It is not for us to pass upon the wisdom of segregating boys and girls in high school. We are not concerned with the desirability of the practice, but only its constitutionality.[20]

In summary, the language used by the various judges in decisions regarding questions raised concerning certain educational practices clearly shows that the courts are not interested in becoming de facto school boards. While some educational practices such as ability grouping and the use of standardized tests have been closely examined by the courts within recent years, they have consistently refrained from ruling on the validity of any particular practices. However, the courts have not been hesitant to terminate any educational practices which result in the denial of any constitutional rights of students.

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[18]Morales v. Shannon, 516 F. 2d. 411 (Fifth Cir., 1975).

[19]Vorchheimer v. School District of Philadelphia, 532 F. 2d. 880 (Third Cir., 1976).

[20]Ibid., p. 888.

Changing Interpretations of the Equal Protection Clause

Many students of the Constitution maintain that the meaning of the Constitution is what a particular court interprets it to be at a certain time. This appears to be the case concerning the Equal Protection Clause of the Fourteenth Amendment. Depending on the composition of the Supreme Court, an individual's rights under this clause have been expanded or restricted within recent years.[21]

Currently, it appears that the Supreme Court is searching for proper balance between intervention in and abstention from the affairs of the legislature.[22] Under the Warren Court, the "strict scrutiny" standard was employed by the Court when questions regarding equal protection of the laws were raised. Legislation which impaired some "fundamental right" or created a "suspect classification" generally was invalidated by the Court during this era.[23] Under the "strict scrutiny" standard, the only way a state could continue a practice which impaired a fundamental right or created a suspect classification was to prove that its action served some compelling governmental interest. In practice, this was very difficult to do, and as a result most of the legislation creating these conditions was invalidated.[24]

Since the Warren Court era, the Court has applied the traditional or rational test standard to cases involving questions of equal protection of the laws. When using this standard, the Court assumes that

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[21]Martha McCarthy, "Is the Equal Protection Clause Still a Viable Tool for Effecting Educational Reform?" Journal of Law and Education, Vol. VI, No. 2 (April, 1977) 159.

[22]Ibid. [23]Ibid., p. 160. [24]Ibid., p. 161.

the state action is constitutional and requires the state to prove only that the practice being challenged bears some logical and rational relationship to the established goals of the government.[25]

Some observers feel that the Burger Court is now searching for a middle standard which would require a closer examination of the state action than has been required under the traditional or rational standard.[26] Likewise, this middle-ground standard would not automatically mean that all cases based on the denial of some "fundamental" right or on the creation of a "suspect" classification would be invalidated as was the case under the "strict scrutiny" standard.[27]

This emerging equal protection standard of the courts may eventually result in the development of a set of criteria which can be uniformly applied to the evaluation of state action and to the protection of personal rights. An analysis of the various court decisions in cases related to grouping and classification indicates that the courts are not consistent in their interpretations of the Fourteenth Amendment at this time.

ABILITY GROUPING RELATED TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS

Overview

As defined earlier in this chapter, the Fourteenth Amendment to the Constitution of the United States prohibits any state and/or governmental creation from depriving any individual of life, liberty, or the pursuit of happiness without due process of law. The Fourteenth Amendment also prohibits any state from denying any person within the state equal

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[25]Ibid. [26]Ibid., p. 162. [27]Ibid.

protection of the laws.[28] Whether or not the practice of ability grouping falls under one of the categories protected by this amendment is a question unanswered by the courts as of this date. In relationship to the practice of ability grouping, it should be noted that the courts do not assume that all grouping practices are discriminatory. However, the courts are examining such practices more closely in an effort to determine if the students are receiving any real benefits.[29]

The courts clearly have established the principle that individuals are entitled to minimal due process procedures before they can be stigmatized by public officials. In a case not related to education or schools, Wisconsin v. Constantineau (1971), the United States Supreme Court held that an individual could not be publicly labeled and stigmatized as a drunkard without a due process hearing.[30] This principle has since been applied to public education issues such as suspension from school, identification and placement of students into special education classes, and corporal punishment. Since there is evidence to suggest that ability grouping practices tend to stigmatize students who are assigned to the low groups, it is conceivable that future court decisions might require some form of minimal due process hearing procedures before students are assigned to the lower groups.[31]

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[28]U. S. Constitution, amendment XIV, sec. 1.

[29]McCarthy, op. cit., p. 170.

[30]Wisconsin v. Constantineau, 400 U. S. 433 (1971).

[31]Chester M. Nolte, Due Process and Its Historical Development in Education, U. S. Educational Resources Information Center, ERIC Document ED 088 186 (April, 1974), p. 14.

Historically, children have not been considered as full citizens, and thus, certain constitutional rights afforded to adults have not been given to students. Recent landmark decisions by the United States Supreme Court, however, have now established the principle of full citizenship for students. Due process rights for students were established as a legal principle in the Goss v. Lopez (1975) case. The Supreme Court ruled that public education, once established by the state, becomes a property right which is protected by the Constitution. Specifically, the Court said that school officials must provide students with minimal due process procedures before excluding them from school, even for a short period of time.[31]

Some educational practices which are similar to the practice of ability grouping in that they tend to result in the attachment of a stigma to certain students have been litigated in the courts. Some of these practices have resulted in court decisions requiring school officials to provide students with appropriate due process procedures. For example, the Philadelphia School System established a program of transferring students who became discipline problems from one school to another. This program was called "lateral" transfers, and students were routinely transferred without the benefit of any hearing procedures. Parents of some of the transferred students brought suit challenging the system's denial of due process hearing procedures. The District Court for the Eastern District of Pennsylvania ruled that the "lateral" transfers represented a stigma identification at least equal to that of being suspended from school for a short period. The Court ruled, based

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[32]Goss v. Lopez, 519 U. S. 565 (1975); see also Wood v. Strickland, 416 U. S. 935 (1974).

on the Goss legal precedent, that minimal due process procedures must be afforded students before they could be "laterally" transferred.[33]

Ability Grouping and Educational Opportunity

The argument that individuals have a right to equal educational opportunities is predicated on the Equal Protection Clause of the Fourteenth Amendment. Armed with the courts' interpretation as to what this means insofar as an individual's rights are concerned, numerous legal challenges have been made within recent years by parents who feel that certain practices of the school system are resulting in unequal educational opportunities for their children.

Most court cases relating to educational practices between 1960 and 1972 were primarily concerned with whether or not certain practices resulted in racial discrimination. During this period, courts refrained from making any rulings concerning the legality of educational practices. Recent court decisions on educational issues, however, indicate that the courts are looking closely at educational practices in an effort to determine if they insure equal educational opportunities for all students. More and more, the courts appear to be requiring school systems to prove a direct educational relationship between educational practices such as ability grouping and the ability to learn.

In the most widely-publicized case related to ability grouping, Hobson v. Hansen (1967), the Federal District Court for the District of Columbia ruled that ability grouping, as practiced in the school system, was a violation of the students' Constitutional rights to

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[33]Everett v. Marcase, 426 F. Supp. 397 (E. D. Pa., 1977).

equal educational opportunities.[34] Evidence in the case indicated that the track assignments were not directly related to the ability to learn; that vocational choices were significantly limited by the track assignments; that no remedial instruction was provided for students in the lower tracks, a factor which resulted in very few students being moved from their initial assignment; and that the limited curriculum available to students in the low tracks offered them very little in educational enrichment. Hence, the ability grouping plan was denying equal educational opportunities for the students in the lower tracks.[35]

Further evidence that the ability grouping plan did not offer students in the low groups equal educational opportunities was the fact that the experienced teachers generally were assigned to the higher tracks, thus leaving the lower groups taught by the most inexperienced teachers. Evidence also revealed a self-fulfilling prophecy in existence in the Washington School System which was caused by the low expectations teachers had for the students. This, too, contributed to the ruling that the ability grouping plan was not providing equal educational opportunities for all students.[36]

The essence of the decision in Hobson v. Hansen is that in order for any ability grouping plan to be constitutionally acceptable, it must ensure equal educational opportunities for all and must bring students into the mainstream of public education without perpetuating isolation. Thus, the question regarding ability grouping is not whether a particular placement is right or wrong, but whether or not the school

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[34] Hobson v. Hansen, 269 F. Supp. 401, 511 (1967), aff'd sub nom. Smuck v. Hobson, 408 F. 2d. 175 (D. C. Cir., 1969).

[35] Ibid., pp. 512-514.

[36] Ibid.

system can prove that such placement is meeting the child's specific educational needs and whether or not a less extreme alternative is available.[37] Courts have been consistent in implying or actually stating that school officials have the right to employ ability grouping or any other form of instructional organization so long as the above constitutional tests are met.

In Copeland v. School Board of City of Portsmouth, Virginia (1972), the District Court ruled that the existence of a disproportionate percentage of minority students in a school for mentally retarded was not grounds for closing the school.[38] In this case, the Court said the school system had shown that the special schools were meeting the educational needs of the students and that there had been no intent to resegregate the school system.[39] In McNeal v. Tate (1975), the Fifth Circuit Court of Appeals ruled that ability grouping would be a legally acceptable practice if the school system could show that such grouping resulted in better educational opportunities for the students.[40] In Morales v. Shannon (1975), the Fifth Circuit Court of Appeals approved a school system's ability grouping plan after finding that the plan did, in fact, offer students a better educational opportunity. The plan was approved even though it resulted in the resegregation of some classrooms.[41]

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[37]Ibid., p. 516.

[38]Copeland v. School Board of City of Portsmouth, Virginia, 464 F. 2d. 932 (Fourth Cir., 1972).

[39]Ibid.

[40]McNeal v. Tate County, 508 F. 2d. 1017 (Fifth Cir., 1975).

[41]Morales v. Shannon, 516 F. 2d. 411 (Fifth Cir., 1975).

In the 1974 Lau case, the United States Supreme Court ruled that a school system's decision not to offer remedial English to a group of Chinese students was a violation of the students' rights to equal educational opportunities.[42] Even though the school system was providing equal treatment for all students, the results were discriminatory in that a group of students were not being provided the special help they needed in order for them to succeed. The implication of this decision is that any school practice must be appropriate to the needs of the students if it is to be acceptable to the courts. If a school system employs some type of ability grouping organization, the implication of the Lau decision is that the school system must be able to show that such a plan provides greater educational benefits for the students than does a non-grouping plan.

Ability Grouping and Racial Discrimination

The legality of ability grouping practices was first tested in the courts during the 1960's when it became apparent that some school systems were using grouping practices to circumvent school integration. Suits were initiated by the United States Justice Department, by Health, Education, and Welfare officials, and by individuals challenging the grouping and organizational plans which, they contended, often resulted in resegregating the schools.[43]

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[42] Lau v. Nichols, 414 U. S. 653 (1974).

[43] Martha McCarthy, "Judicial Evaluation of Student Classifications," Nolpe School Law Journal, VI, No. 2 (1976), 135.

School officials and school boards maintained that ability grouping was a legitimate educational practice designed to help both low-achieving and academically talented students. When challenged in court concerning grouping and related practices, some school boards also admitted that this method was an attempt to discourage white parents from transferring their children to the private schools.[44]

While the courts maintained that they did not wish to become involved in the administration of the public schools, they consistently responded to protect the constitutional rights of the students. Whenever the courts found evidence that ability grouping practices resulted in racially identifiable classrooms in the recently-integrated schools, the courts ruled that such practices must be ended.

The landmark decision of the United States Supreme Court in Brown v. Board of Education (1954) established a number of legal tenets concerning racial discrimination in the public schools. Perhaps the two most important legal principles established by this case were that the doctrine of "separate but equal" had no place in the field of public education and that the opportunity for an education must be made available to all on equal terms.[45] While no part of the Brown decision directly related to ability grouping, the legal principles established by this case have been referred to numerous times by various judges in cases that are directly related to the issue of ability grouping.[46]

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[44]Ibid.

[45]Brown v. Board of Education, 347 U. S. 495 (1954).

[46]Martha M. McCarthy, "Is the Equal Protection Clause Still A Viable Tool for Effecting Educational Reform?" Journal of Law and Education, VI, No. 2 (April, 1977) 163.

A landmark case in the area of school desegregation which did have a direct influence on educational practices such as ability grouping and the use of standardized tests was the 1969 case of Alexander v. Holmes County Board of Education. The essence of the decision was to require school systems immediately to cease operating dual school systems and to begin operating unitary systems.[47] Based partially on this decision, federal courts consistently struck down desegregation plans which included ability grouping and tracking practices. In Singleton v. Jackson, the Fifth Circuit Court of Appeals ruled that the Holmes decision had superseded the "all deliberate speed" doctrine under which schools were operating and that school systems could not use grouping or any other organizational schemes which prohibited the total integration of all schools and all classrooms.[48] Likewise, this same court in Moses v. Washington Parish School Board (1972) ruled that the use of testing for purposes of establishing ability groups was impeding the establishment of a completely unitary school system as required by the Alexander v. Holmes decision.[49]

Most of the court cases that relate to racial discrimination are based on Section 1 of the Fourteenth Amendment, which prohibits a state from denying any person equal protection of the laws.[50] Section 5 of the Fourteenth Amendment gives Congress the power to pass

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[47]Alexander v. Holmes County Board of Education, 369 U. S. 20 (1969).

[48]Singleton v. Jackson Municipal Separate School District, 419 F. 2d., p. 1219 (Fifth Cir., 1970).

[49]Moses v. Washington Parish School Board, 330 F. Supp., 1340-1341 (1971); aff'd, 456 F. 2d., 1285 (Fifth Cir., 1972).

[50]U. S. Constitution, amend. XIV, sec. 1.

"appropriate legislation" in order to enforce this amendment.[51] Using this section of the Constitution as its source of authority, Congress passed the Civil Rights Act of 1964, which empowered the Attorney General to initiate suits to effectuate the desegregation of the schools. This Act proved to be an important event in the elimination of racial isolation within the schools. One of the extensive Department of Health, Education and Welfare guidelines developed to enforce the Civil Rights Act within the public schools stated that any school receiving federal funds could not employ any grouping or organizational practice which resulted in racially identifiable classes.[52]

While the federal courts gave great weight to the Department of Health, Education, and Welfare guidelines in assessing the adequacy of desegregation plans, the courts made clear that constitutional rights of students were in the judiciary sphere and not in the legislative or executive spheres. In Swann v. Charlotte-Mecklenburg (1971), the United States Supreme Court firmly rejected the idea that the Civil Rights Act could limit the power of the courts.[53]

In almost every case involving educational issues such as ability grouping, racial overtones are in evidence. Whenever the courts discover a racial imbalance in the composition of special education classes or low tracks, this generally is interpreted as "suspect classification." When this occurs, school officials are responsible for

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[51]U. S. Constitution, amend. XIV, sec. 5.

[52]Emergency School Aid Act, Section 704, 706, as amended, 20 U. S. C. A. Section 1603, 1605.

[53]Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1, 191 (1971).

justifying the use of such practices.[54] In a 1975 case, Board of Education, Cincinnati v. Department of HEW, a Federal Court in Ohio ruled that the school system had not established a clear educational justification for grouping practices which resulted in a disproportionate number of black students being assigned to the lower groups.[55] The Federal District Court affirmed the principle established by earlier decisions that grouping and tracking practices are legitimate educational conventions which can be used by school systems if they are not subterfuges for racial discrimination; however, when such practices result in racially identifiable classes, the burden of such justification will be on the school system.[56]

In a case involving interschool segregation based on ability grouping, Berkelman v. San Francisco Unified School District, the Ninth Circuit Court of Appeals ruled that the school system's use of ability grouping was educationally justified. The case involved the assignment of students to an academically elite senior high school based on student achievement. Even though this resulted in a substantial underrepresentation of black, Spanish-American, and low socioeconomic students being assigned to the academic high school, the court found that this method

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[54]Thomas E. Shea, "An Educational Perspective of the Legality of Intelligence Testing and Ability Grouping" Journal of Law and Education, VI, No. 2 (April, 1977), 171.

[55]Board of Education, Cincinnati v. Department of HEW, 397 F. Supp., 220 (1975).

[56]Ibid., p. 221.

of assignment was a "non-suspect classification" and that there was no clear evidence of an intent to discriminate.[57]

Ability Grouping and the Use of Standardized Tests

Whereas courts have been reluctant to become involved in debates concerning merits of ability grouping and tracking practices, they have been almost as reluctant to become involved in determining the legality of the use of ability and achievement tests for educational purposes.[58] However, when it is obvious that school systems are using the results of such tests in a discriminatory manner or when it can be proven that tests themselves are culturally biased instruments, the courts have not hesitated to intervene.[59]

As school systems throughout the South began to integrate schools in response to Department of Health, Education and Welfare guidelines and court orders, it became apparent to school officials that many black and low-income students were very low in academic skill development. In searching for ways to help students increase basic skills, and in some cases to cushion the impact of total integration with the white community, many school boards in recently integrated school systems initiated ability grouping and tracking programs. The predominant criteria for making group or track assignments were scores students made on standardized ability and achievement tests. When it was brought to the attention of the courts that such grouping plans were resulting in racial imbalance and even in resegregation of some classes

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[57] Berkelman v. San Francisco Unified School District, 501 F. 2d. 1264 (Ninth Cir., 1974).

[58] Shea, op. cit., p. 147.

[59] Ibid.

or schools, such plans were invalidated by the courts, and the use of standardized tests was banned.

One of the earliest legal challenges to the use of test results for grouping purposes was in the Hobson v. Hansen (1967) case in Washington, D. C.[60] At that time, the school system used a comprehensive tracking system which placed students in a particular learning track as early as sixth grade based on scores students received on standardized achievement and ability tests. Judge Skelly Wright ruled that low test scores did not relate to any lack of innate intelligence, but rather to socio-economic, cultural, and educational deprivation of students and to various testing biases.[61] Since actual track assignments were not shown to be directly related to ability to learn, and since tests being used had been normed on white, middle class students, Judge Wright invalidated the tracking program as it was being used in that system. Judge Wright was careful to point out, however, that if a different plan based on unbiased tests and directly related to educational needs of students could be developed, such a plan could meet the constitutional requirements.[62]

The use of standardized tests continued to be an issue in a number of federal court cases between 1967 and 1975. Most of these cases were based on allegations of racial discrimination, denial of due process, or denial of equal protection of the laws. Whenever the courts discovered schools that contained racially identifiable classrooms, the courts placed such schools in the "suspect classification" status. If

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[60]Hobson v. Hansen, op. cit., p. 445.

[61]Ibid., p. 511. [62]Ibid., p. 446.

the racial imbalances were found to be resulting from ability grouping practices based on standardized test results, school officials were required to demonstrate a direct relationship between the testing process and purposes of the ability grouping. Most school systems were unable to meet this requirement. Consequently, the ability grouping plans based on standardized tests were invalidated by the courts in many of the early cases.

The Fifth Circuit Court of Appeals ruled in Singleton v. Jackson (1969) that a school system could not use standardized tests for any purpose until it had been totally integrated for a sufficient period of time to allow all students time to overcome any educational deprivation caused by previous school segregation.[63] This decision became the legal precedent for a series of similar cases in the Fifth Circuit Court of Appeals. The use of standardized tests for grouping purposes was banned in recently integrated schools in U. S. v. Board of Education of Lincoln County (1969), U. S. v. Sunflower County School District (1970), and Lemon v. Bossier Parish School Board (1970).[64] It should be noted that the Court was able to provide Constitutional protection for individuals who brought allegations of discrimination and at the same time postpone having to rule on the validity of the tests themselves.

In Moses v. Washington (1972), the Fifth Circuit Court of Appeals affirmed the District Court's decision to invalidate the grouping plan

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[63] Singleton v. Jackson, op. cit., 1225.

[64] U. S. v. Board of Education of Lincoln County, 321 F. Supp. 1024 (1969); see also U. S. v. Sunflower County School District, 430 F. 2d. 839 (Fifth Cir., 1970); see also Lemon v. Bossier Parish School Board, 444 F. 2d., 1400 (Fifth Cir., 1971).

of an elementary school in Louisiana. The Appeals Court ruled the reading tests which were administered to all students impeded the immediate establishment of a unitary school system as required by the United States Supreme Court in Alexander v. Holmes (1969), and that such practices were not permissible.[65] The Court found that the grouping plan was a continuing program as opposed to a compensatory plan and that the testing program was used primarily for identification for initial placement.[66]

The Courts were somewhat consistent with their proclamations that students could be classified and assigned by school systems to groups or tracks so long as the criteria for the assignment were not racially biased and discriminatory. In Moore v. Tangipahoa Parish School Board (1969), the court found that the school system was unable to prove that the tests used for assigning students to the various groups were free from all racial bias; thus, their plan was invalidated by the court.[67]

In a 1972 case, the Fourth Circuit Court of Appeals ruled that a special school for students with severe learning problems was permissible even though it contained a disproportionate number of black students. The Court found the tests being used to identify the students for placement were relevant, reliable, and free of discrimination.[68] Since the Court found the tests to be unbiased and the special school to be

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[65]Moses v. Washington, op. cit., p. 1287.

[66]Ibid.

[67]Moore v. Tangipahoa Parish School Board, 304 F. Supp. 244 (1969).

[68]Copeland v. School Board City of Portsmouth, Virginia, 464 F. 2d. 932 (Fourth Cir., 1972).

educationally justified, the Court ruled that the school could continue to exist even though it was a "racially identifiable" school.[69] This case represents one of the few instances when a federal court addressed itself to the issues relating to test validity.

In a case relating to standardized tests and sex discrimination, Bray v. Lee (1972), the Massachusetts District Court ruled that the Boston School Committee could not require female students to score higher than boys on an academic admissions test.[70] The Court found such practice to be a clear violation of the Equal Protection Clause of the Fourteenth Amendment.[71] The ruling in this case stated that it would be permissible to establish different admission standards for different kinds of schools, but that it is not permissible to use separate standards for boys and girls for schools of the same type.[72]

Repeatedly, as cases came before federal courts, the proclamation was made by the courts that they were not interested in even considering the educational merits of standardized tests. The courts were concerned with whether or not the tests were unbiased and valid instruments and whether the tests were being administered in an unbiased manner.[73] In several instances, courts included in their decisions a statement to the effect that use of standardized tests would be acceptable to them if such tests were unbiased, valid instruments which resulted in grouping

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[69]Ibid., p. 945.

[70]Bray v. Lee, 337 F. Supp. 934 (1972).

[71]Ibid.

[72]Ibid., p. 936.

[73]Hobson v. Hansen, op. cit. p, 522; see also U. S. v. Choctaw Board of Education, op. cit., p. 419; see also McNeal v. Tate County School District, 508 F. 2d., 1019 (Fifth Cir., 1975).

practices that were educationally justifiable. For example, in Morales v. Shannon (1974), the Fifth Circuit Court of Appeals ruled that the school system's ability grouping plan was permissible even though the plan had resulted in the assignment of a disproportionate percentage of Mexican-American students to low groups. The Court found that the assignments met all of the legal tests established by the Constitution: the assignments were made in a non-discriminatory manner; the tests used for assignment purposes were found to be unbiased and valid instruments; scores on both reading and math standardized tests were used; the grouping plan served to help the school system achieve its educational objectives and was not a subterfuge for racial discrimination.[74]

Thus, the courts have moved from a position where they refused even to consider discussing the legality of using standardized tests in the then recently desegregated schools all the way to the present, where even the validity of the tests themselves is considered by courts. It should be noted that no tests have been declared invalid by the courts and that most of the court decisions involving testing issues continue to be centered around what the school system does with the results of the tests.

CLASSIFICATION OF STUDENTS RELATED TO THE FOURTEENTH AMENDMENT

Overview

Perhaps one of the oldest educational practices is the classification of students within the schools. Students are classified by

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[74]Morales v. Shannon, op. cit., pp. 413-414.

age, sex, athletic ability, academic ability, musical ability, and many other differentiating characteristics. P.L. 94-142 has added emphasis to the classification of all handicapped students. The purpose of this required classification is to insure that various handicaps are properly diagnosed and that appropriate educational programs are then provided for students in each handicapped classification.[75]

Until the past decade, unless the classification was based on race, the courts generally did not consider it as a "suspect classification." Even now, the courts are not questioning the right to classify students. However, courts often do question procedures used in making classifications and whether or not constitutional rights are guaranteed.[76]

In addition to classifications based on race, classifications based on other unalterable characteristics such as handicaps and sex are now considered by the courts as "suspect classifications." As a result, classifications by schools based on these criteria are subject to close scrutiny by the courts.

Applying the Fourteenth Amendment to Classifications Based on Handicaps.

When a school system's classification program is challenged in the courts, challenges usually are based on the allegation that students were denied due process procedures before being placed in the special classes or that the students were denied equal protection of the laws

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[75] Federal Register, XLII, No. 163 (August 23, 1977), p. 42494.

[76] McCarthy, op. cit., pp. 169-171.

because the assigned class did not appropriately meet educational needs of the students.[77]

While the United States Supreme Court has not rendered a landmark decision relative to the right of handicapped children to a public education, several state and federal district courts have ruled that handicapped students have been denied constitutional rights of due process and equal protection of the law when they have been excluded from school or when they have been incorrectly classified. As a result of the decisions rendered in a number of these cases, handicapped students and their parents are now guaranteed equal protection of the laws and due process procedures before the students are placed in any special classes. One such case was Stewart v. Phillips (1970), in which parents of identified handicapped students sought to enjoin the Boston School System from using biased tests for purposes of identifying students for placement into classes for the mentally retarded. The parents contended that their children were being denied due process and equal protection of the laws because they were segregated from normal students and thus subjected to stigmatization by teachers and peers.[78] In California, parents of Spanish-speaking children initiated a suit challenging the school system's testing program, which resulted in a disproportionate number of Spanish-speaking children being assigned to classes for the mentally retarded. Since the tests were administered in English, parents contended that their children had been denied equal protection

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[77]Merle McClung, "School Classification: Some Legal Approaches to Labels," Classification Materials, Center for Law and Education (Cambridge, Massachusetts: Harvard University Press, 1973), p. 5.

[78]Stewart V. Phillips, C. A. No. 70-1199-F (D. Mass., 1970).

of the laws. An out-of-court settlement was reached in this case, which included corrections to most of the alleged discriminatory practices.[79]

In San Francisco, a class-action suit was brought by parents of black students who had been labeled as mentally retarded. The major allegation in this case was that students were not receiving equal protection of the law as a result of the school system's use of culturally-biased tests for purposes of placing students into classes for the mentally retarded. This case, Larry P. v. Riles, first litigated in 1971, is still in the federal courts of California. In 1971, the District Court agreed that the use of standardized tests for placement purposes did constitute a denial of equal protection of the laws, and a temporary injunction was issued banning the school system's use of tests for this purpose.[80] In 1973, the injunction was extended to the entire state of California. The issue at the present time is whether or not the temporary injunction should become permanent.[81] The 1971 ruling required the school system to provide a comprehensive reevaluation for all students who had been placed in classes for mentally retarded on the basis of scores obtained from standardized tests.[82]

Legal principles setting forth guidelines for school systems to follow in providing due process procedures for all handicapped children were established by the landmark decision in Pennsylvania Association

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[79]Diana v. State Board of Education, C. A. 70 37 RFT (N. D. Cal., Feb. 3, 1970).

[80]Larry P. v. Riles, 343 F. Supp. 1306 (N. D. Cal., 1972).

[81]Associated Press dispatch, Greensboro (N. C.) Daily News, October 12, 1977, Sec. A. p. 8, cols. 1-2.

[82]Larry P. v. Riles, op. cit., p. 1309.

of Retarded Children v. Commonwealth of Pennsylvania (1972) and in Mills v. Board of Education of the District of Columbia (1972). These two decisions have firmly established the principles of non-exclusion of handicapped students, the guarantee of full and appropriate hearings for all students before significantly changing their status within the school, and full reevaluation of the educational assignment for every mentally retarded child at least every two years.[83]

As a result of pressure from parents of handicapped children and as a result of court decisions regarding the rights of handicapped children, Congress enacted the aforementioned P.L. 94-142, The Education of All Handicapped Children Act, in 1975. The law, which became effective in October of 1977, requires school systems to provide a free and appropriate educational program for every handicapped student, and it mandates that this be done in the least restrictive environment possible. In addition, the law requires that parents and students be guaranteed all appropriate constitutional rights before any labeling and placement occurs.[84] While no court tests have been made of this law and its implementation as of this date, one can reasonably predict that litigations will result from the implementation of this law.

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[83]Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania, 343 F. Supp. 179 (E. D. Pa., 1972); see also, Mills v. Board of Education, 348 F. Supp. 866 (D. D. C. 1972).

[84]Federal Register, XLII, No. 163 (August 23, 1977), p. 42494.

Applying the Fourteenth Amendment to Classifications Based on Sex and Marriage.

Within recent years the courts increasingly have been asked to review discrimination claims based on the inherent trait of sex. A review of the court cases in this arena indicates that courts have been consistent in declaring invalid those practices which discriminate based on one's sex.[85]

In Bray v. Lee, the Boston School System's policies for admission to the boys' and girls' elite academic schools were challenged. Since the school for girls accommodated fewer students than did the boys' school, the school system established higher entrance examination scores for female applicants. The Federal Court ruled that this practice represented unconstitutional discrimination on the basis of sex and that such practices were therefore a violation of the Equal Protection Clause of the Fourteenth Amendment.[86] In a similar case in California, Berkelman v. San Francisco Unified School District, the Ninth Circuit Court of Appeals ruled that a school system could not require higher entrance standards for girls than for boys. Since the academic standards were high at the elite academic school and since the graduates of this school were better prepared for college and hence, for better jobs, the Court determined that higher entrance standards for girls than for boys was a direct violation of the Equal Protection Clause.[87] Interestingly,

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[85] Reed v. Reed, 404 U. S. 71 (1971); see also, Frontiera v. Richardson, 411 U. S. 677 (1973); see also Berkelman v. San Francisco United School District, 502 F. 2d. 1264 (Ninth Cir., 1974).

[86] Bray v. Lee, 337 F. Supp. 934 (D. Mass. 1972).

[87] Berkelman v. San Francisco Unified School District, 501 F. 2d. 1268 (Ninth Cir., 1974).

the Court upheld the system's right to operate the academically elite school even though the student body contained a disproportionately small percentage of minority students.[88] Since entrance standards did not discriminate against ethnic and culturally-deprived minorities and since the school system was able to show a direct relationship between the system's educational objectives and the special school, the Court ruled that the plaintiffs had not been denied equal protection of the law merely because the student body did not contain a proportionate percentage of minority students.

Numerous court decisions have been rendered in recent years concerning sex discrimination in school athletics. Most of these decisions have invalidated school systems' policies which ban the participation of females on athletic teams. The general legal principle is that such policies are arbitrary, unreasonable, and a direct violation of the Equal Protection Clause of the Fourteenth Amendment. Most of the rulings to date have found no reasonable justification for policies banning participation by girls on non-contact teams or in interscholastic activities.[89] In Brenden v. Independent School District 742, the Federal Court, in striking down a school system's ban on females' participating in athletics, stated:

> There is no longer any doubt that sex-based classifications are subject to scrutiny under the equal protection clause and will be struck down when they provide dissimilar treatment for men

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[88]Ibid., p. 1267.

[89]Haas v. South Bend Community School Corporation, 339 N. E. 2d. 495 (Ind. Sup. Ct. 1972); see also, Brenden v. Independent School District 742, 342 F. Supp. 1224 (D. Minn. 1972), aff'd 477 F. 2d. 1292 (Eighth Cir., 1973).

and women who are similarly situated with respect to the object of classification.[90]

Marriage and pregnancy are other areas in which there are no inherent characteristics. Because of this, legal questions regarding the rights of married students and pregnant students continue to emerge in the courts. The courts generally agree that married students have a right to attend school the same as unmarried students. While some courts have upheld school board policies which deny married students the right to participate in extra-curricular activities, more and more court decisions are recognizing that such activities are an integral part of the school program and that married students should not be denied the right to participate fully and equally in all phases of public education.[91]

In cases based on discrimination because of pregnancy, courts generally require the school systems to show a direct relationship between the health of the student and any practice which allegedly discriminates.[92] If a school system is not able to demonstrate an educational purpose or show medical reasons for any discriminatory practices, courts generally will ban such practices on the basis that such practices deny individuals equal protection of the laws.

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[90] Brenden v. Independent School District 742, 342 F. Supp. 1234 (D. Minn., 1972).

[91] Davis v. Meek, 344 F. Supp. 298, 301 (N. D. Ohio 1972); see also, Moran v. School Dist. No. 7, Yellowstone County, 350 F. Supp. 1180 (D. Mont. 1972); see also, Holt v. Shelton, 341 F. Supp. 821 (M. D. Tenn. 1972).

[92] Ordway v. Hargraves, 332 F. Supp. 1155 (D. Mass. 1972); see also Perry v. Grenada Municipal Separate School District, 300 F. Supp. 748 (N. D.Miss. 1969).

LIABILITY OF SCHOOL BOARD MEMBERS AND ADMINISTRATORS FOR ACTS WHICH VIOLATE CONSTITUTIONAL RIGHTS OF STUDENTS

Personal Liability of School Officials and the Civil Rights Act of 1871.

Within the past decade, a number of liability suits have been initiated against school boards and school board members for violations of an individual's Constitutional rights. School board members and administrators who make and enforce rules and regulations leading to statutory or constitutional violations may be held liable for monetary damages under Section 1983 of the Civil Rights Act of 1871 which provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.[93]

Under Section 1983 of the 1871 Civil Rights Acts, individuals who allege a denial of due process may bring action for declaratory and injunctive relief against the school board and the administrators involved. They may also bring action for financial damages against the individuals who made the decisions.[94] This issue was tested in a United States Supreme Court case, Wood v. Strickland, in 1974. The Court ruled that school board members could be held liable for acts which violate a student's constitutional rights.[95] Said the Court in establishing a standard for "good faith" immunity:

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[93]The Civil Rights Act of 1871, 42 U. S. C. sec. 1983.

[94]Robert E. Phay, "Individual Liability of School Board Members and School Administrators," School Law Bulletin, IV, No. 4 (October, 1973), 3.

[95]Wood v. Strickland, 416 U. S. 935 (1974).

> The official must himself be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. To be entitled to a special exemption from the categorical remedial language of 1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic unquestioned constitutional rights of his charges.[96]

Based on the precedent established by Wood, it is conceivable that a student could collect damages from school board members and school administrators for actions taken which violate a fundamental constitutional right. For example, if a student is misclassified as a result of the misuse of a test or as a result of a biased test, school officials could be financially liable. Likewise, if a student is stigmatized with a label as a result of being placed in a low group or track, and if such placement is made without some form of due process hearing, such action could result in a damage claim suit by the student.[97]

While the Constitution does not specifically address itself to the question of student privacy and confidentiality of records, the courts have recognized that personal privacy is a constitutionally-protected right.[98] In the process of identifying students for special services,

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[96]Ibid.

[97]"School District Liability, Board Member Liability and Ignorance of Constitutional Rights Is No Excuse." Missouri School Law Letter, IV, No. 2 (May, 1975), 2.

[98]Merriken v. Cressman, 364 F. Supp. 913 (E. D. Pa., 1973); see also LeBanks v. Spears, C. A. No. 71--2897 (E. D. La. April, 1973).

it is essential that school officials adopt procedures which will ensure the protection of the students' Constitutional rights.

Recent court decisions concerning privacy rights have caused school officials to establish policies and procedures for the release of information regarding student test scores, discipline records, and psychological records. Indiscriminate release of such records can lead to stigmatization of students, and thus become a litigious issue. For example, in 1973, the Eastern District Court of Pennsylvania ruled in Merriken v. Cressman that a school program designed to identify potential drug abusers was in violation of the student's right to privacy.[99] The Court ruled that the parents had not been fully informed about the possible self-fulfilling prophecy and stigmatization effects of the records and of the ensuing label.[100]

When questions arise regarding public interest versus individual privacy rights, the courts weigh the degree of public need and the degree of invasion of privacy. In the Merriken case, the Court concluded that the label of potential drug abuser was a stigmatization that could permanently damage the student.[101]

Court decisions, such as the Merriken decision cited above, along with continuing parental pressure, resulted in the passage of the 1974 Family Educational Rights and Privacy Act. This act guarantees parents the right to examine all school records of their children, and the right to challenge any information they feel is incorrect, or to question

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[99]Merriken v. Cressman, 364 F. Supp. 921 (E. D. Pa. 1973).

[100]Ibid.

[101]Ibid., p. 920.

data that might tend to stigmatize the child with a label.[102] Further guarantees of students' privacy are contained in P.L. 94-142, the Education for All Handicapped Children Act.[103]

The specific guidelines contained in the two laws cited above, along with the guidelines contained in such landmark court decisions as P. A. R. C. v. Pennsylvania and Mills v. D. C. Board of Education should ensure that the privacy rights of students will be protected when they are being tested and classified for special instructional services. By developing and implementing sound policies based on these guidelines, school board members and school officials should be able to avoid any court decisions requiring financial liability for violation of student rights.

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[102]Federal Register, XLI, No. 118 (June 17, 1976), p. 24662.

[103]Federal Register, XLII, No. 133 (August 23, 1977), p. 42494.

Chapter IV

REVIEW OF COURT DECISIONS

INTRODUCTION AND OVERVIEW

Since very few court decisions have been made regarding the specific issues of grouping and tracking, cases selected for review in this chapter are those dealing with related issues such as racial discrimination, biased tests, denial of due process in classification procedures, and denial of equal educational opportunities.

A review of the major court decisions in areas related to ability grouping and tracking indicates that the right to group and classify students generally is not being challenged in the courts; the procedures used to make grouping or classification decisions, however, are being questioned and subjected to strict judicial scrutiny.[1]

School systems now find themselves in a position of having to justify any classifications which are challenged under the Equal Protection Clause of the Fourteenth Amendment in terms of showing a positive correlation between the classification and the desired goal of an improved educational opportunity for the students involved.[2]

As the review of the cases will indicate, the courts have been reluctant to question grouping or classification distinctions except for those based on race. This pattern has been changing within the past

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[1]Martha McCarthy, "Judicial Evaluation and Student Classifications," Nolpe School Law Journal, VI, No. 2 (1976), 133.

[2]Ibid., p. 134.

few years, however, as distinctions based on ability, marriage, sex, pregnancy, or any other traits are being subjected to judicial review.[3]

ORGANIZATION OF CASES SELECTED FOR REVIEW

Cases chosen for review in this chapter were selected because they met one or more of the following criteria:

(1) The case is considered to have been a landmark case in the broad constitutional areas of racial discrimination and due process of law.

(2) The case helped to establish legal precedent or "case law" in a particular area such as testing, grouping, or classifying students.

(3) The issues in the case relate to one of the following sub-topics:

- (a) ability grouping or tracking and racial discrimination;
- (b) ability grouping or tracking and the use of standardized tests;
- (c) student classification based on sex, ability, language or environment;
- (d) denial of due process in grouping, tracking, or classifying students.

(4) The case is considered to have been important in the area of classification and placement of handicapped students.

The first series of court cases selected for review are those United States Supreme Court landmark decisions relating to the broad constitutional issues of racial discrimination and denial of equal educational opportunities. Decisions in these cases established the

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[3]Ibid., p. 144.

legal precedents for decisions in cases involving testing, grouping, and classifying students. Included in this category are the following cases:

(1) Brown v. Board of Education (1954);

(2) Alexander v. Holmes County Board of Education (1969);

(3) Swann v. Charlotte-Mecklenburg Board of Education (1971);

(4) Goss v. Lopez (1975).

The second category of cases reviewed in this chapter consists of those United States District Court and Circuit Court of Appeals cases that have significantly contributed to the establishment of the "case law" or legal precedent in the areas of testing, grouping, and tracking students. Cases selected for review in this category include:

(1) Hobson v. Hansen (1967);

(2) Smuck v. Hobson (1969);

(3) Singleton v. Jackson Municipal Separate School District (1970);

(4) Moses v. Washington Parish School Board (1971);

(5) Copeland v. School Board of City of Portsmouth, Virginia (1972);

(6) Serena v. Portales Municipal Schools (1972);

(7) McNeal v. Tate County School District (1975);

(8) Vorchheimer v. School District of Philadelphia (1976);

(9) Everett v. Marcase (1977).

The third category includes selected cases from both state and federal courts relating to the following sub-topics:

(1) Racial discrimination resulting from grouping and/or tracking practices;

(2) Grouping and/or tracking and the use of standardized tests;

(3) Student classification based on sex or other unalterable condition.

Most of the decisions rendered in the cases reported in this category were based on legal precedents established by the United States Supreme Court landmark cases cited in category number one above or on "case law" established by the major Federal District and Circuit Court decisions in the cases cited above in category number two.

The final category of cases selected for review are the recent cases regarding the identification and placement of students into special education classes. Even though the major thrust of this study concerns issues related to ability grouping and tracking practices of the so-called "normal" students, it is not possible to separate the two areas completely. For example, use of tests, denial of due process, and racial discrimination are issues that are related to the assignment of students to various groups and tracks and to the classification and placement of students in special education classes. Therefore, the following key court cases in the area of classification and placement of handicapped students are reviewed in this section of the study:

(1) Stewart v. Phillips (1970);

(2) Diana v. State Board of Education (1970);

(3) Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania (1972);

(4) Mills v. Board of Education of District of Columbia (1972);

(5) Larry P. v. Riles (1972).

UNITED STATES SUPREME COURT LANDMARK DECISIONS--RACIAL DISCRIMINATION AND DENIAL OF DUE PROCESS

Brown v. Board of Education
347 U. S. 483 (1954)

Overview

Since this was the most far-reaching landmark decision regarding the constitutionality of public school pupil segregation, it is referred to in almost every court decision related to discrimination or denial of equal educational opportunities. Many of the recent court decisions regarding testing, grouping, or classifying students have been based on the legal tenets established in this case.

Facts

Several cases which had their origins in state or district federal courts involving the issue of racially segregated public schools were grouped together on appeal because of the common legal questions. The United States Supreme Court handed down its consolidated opinion on May 17, 1954.

The major constitutional questions in this case were as follows:

(1) Can state and local school systems maintain separate school organizational plans for white and black students if facilities, programs, and personnel are equal?

(2) Do laws permitting segregation in the public schools according to race violate the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution?

(3) Is public education a right or a privilege, and must it be provided to all citizens on an equal basis?[4]

Decision

The Supreme Court ruled that forced segregation of students was a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment; that the doctrine of "separate but equal" had no place in the field of public education; that public schools ought to be "color-blind" in their dealings with students; and that the opportunity for education, where the state has undertaken to provide it, must be made available to all on equal terms. The various cases that were consolidated into this one opinion were remanded to the District Courts with instructions to require the school boards to begin admitting students to schools on a nondiscriminatory basis with all deliberate speed.[5]

Discussion

This decision is considered by most educators to have been the most important decision handed down by the United States Supreme Court in the area of public education. As a time reference, educational issues often are discussed in terms of pre- and post-Brown. Almost no facet of public education has been undisturbed by the decision in this case. Numerous academic debates, Board of Education policies, state and federal laws have had as their origin the decision in the Brown case.[6]

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[4]Brown v. Board of Education, 347 U. S. 485 (1954).

[5]Ibid., p. 495.

[6]Edmond E. Reutter and Robert R. Hamilton, The Law of Public Education, (Mineola, New York: The Foundation Press, Inc., 1976), p. 623.

Many court decisions in the areas of testing, ability grouping, and classification of students are based on legal precedents established by the Brown case.

Alexander v. Holmes County Board of Education
396 U. S. 19 (1969)

Facts

The United States Supreme Court received this case on appeal from the Fifth Circuit Court of Appeals. The case involved the alleged abuse by several Mississippi school boards of the "with all deliberate speed" standard for desegregation of the public schools. The contention of the plaintiffs was that many school systems were employing endless stalling tactics for integrating the schools. They sought a court order that would require all school systems to end immediately all aspects of school segregation.[7]

Decision

The Supreme Court ruled that the "all deliberate speed" doctrine for desegregating the public schools was no longer constitutionally permissible and that every school district was to terminate immediately all aspects of dual school systems and begin operating completely unitary systems.[8]

Discussion

In essence, this decision had the immediate result of causing hundreds of court orders to be issued to school systems who had moved too slowly in desegregating dual systems.

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[7]Alexander v. Holmes County Board of Education, 396 U. S. 20 (1969).

[8]Ibid., p. 26.

While not directly related to the topic of grouping and tracking, this case is important to this study in that it eliminated the use of tracking and grouping as a stalling tactic in desegregating schools. In later cases involving questions of in-school segregation, judges used the doctrine of immediate desegregation established by the Alexander v. Holmes decision as the legal precedent for declaring unconstitutional some grouping practices.

Swann v. Charlotte-Mecklenburg
Board of Education
300 F. Supp. 1358 (1969)
402 U. S. 1 (1971)

Facts

The Charlotte-Mecklenburg School System, which is the largest system in North Carolina, was challenged over its "freedom-of-choice" and "neighborhood" school plan. The object of the plaintiff was to force the system into greater speed in its desegregation of the schools and to eliminate certain alleged educational inequalities.

Evidence revealed that a considerable number of the black students were continuing to attend schools that were practically all black, and that achievement test scores continued to be low for these students. The decision in this case was rendered by Judge James McMillan in the United States District Court for the Western District of North Carolina in the Spring of 1969.

Decision

The following orders regarding the desegregation of the Charlotte-Mecklenburg Schools were given by the Court:

(1) a complete desegregation of faculty plan which would apportion all faculties in all schools on a ratio equal to that of the total system;

(2) a new student desegregation plan which would increase desegregation--with no ratios specified;

(3) provisions for free transportation for students transferring from majority to minority schools.[9]

On appeal by both the plaintiffs and the school board, the decision of Judge McMillan was affirmed by the United States Supreme Court in 1971.[10]

Legal Precents Established

While the issues of grouping and tracking were not directly addressed in this case, the legal principles established by this landmark decision are applicable to cases related to grouping, testing, and tracking. The major legal principles established in this decision are as follows:[11]

(1) Local school boards, and not the courts, have the duty and responsibility to assign pupils and operate the schools in a constitutionally acceptable manner.

(2) School boards are clearly charged with affirmative duty to desegregate the schools in a positive manner.

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[9]Swann v. Charlotte-Mecklenburg Board of Education, 300 F. Supp. 1373 (1969).

[10]Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1, (1971).

[11]Ibid., pp. 95-98.

(3) The Constitution is not necessarily "color-blind"--it may be impossible to dismantle a dual school system and completely ignore race; hence, the principle of affirmative action may have to be employed.

(4) Corrections must be made for any segregation caused by official actions of a school board or administrator; conversely, segregation caused by residential patterns does not always have to be corrected by the school board. (Thus, the principle of racial ratios in every school within the system was struck down.)

Goss v. Lopez
419 U. S., 565 (1975)

Facts

This case was an appeal by school administrators of the Columbus, Ohio Public School System of a ruling by the Federal District and Circuit Court of Appeals regarding due process of the law as it relates to the suspension of students. The lower courts had ruled that the appelees, who were high school students in the Columbus School System, had been denied their constitutional rights to due process when they were suspended from their high school. The facts of the case had revealed that the students were not given a hearing prior to the suspensions or within a reasonable time thereafter.[12]

The school administrators appealed the decisions of the lower courts based on the contention that there was no constitutional right to an education at public expense, and therefore, students suspended from school were not protected by the Due Process Clause. They further

[12]Goss v. Lopez, 419 U. S. 565 (1975).

contended that even if the right to a public education was protected by the Due Process Clause, it could only be considered when an individual is subjected to a severe detriment or grievous loss; in this instance, the school officials contended that the ten-day suspension was neither severe nor grievous.[13]

Decision

The United States Supreme Court held that education was a property right protected by the United States Constitution. In delivering the opinion of the Court, Justice White stated:

> Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred.[14]

The Court continued in its ruling to outline the type of process that is due to students who are threatened with suspension. The Court was very careful not to get involved with debating the merits of suspension or the right of the schools to suspend students. The Court did state that the school must provide an informal hearing procedure for any student who is threatened with suspension in order that he might have an opportunity to explain his version of the facts.

Legal Principles Established

Even though this case did not directly involve the issues of grouping and tracking, it did establish certain legal tenets which can be applied to legal issues related to the classification of students for

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[13]Ibid., p. 566.

[14]Ibid., p. 567.

special education classes and possibly to cases involving the assignment of students to low groups or tracks.

Among the legal principles that this decision helped to establish are the following:

(1) Once a state establishes a public school system, it becomes a property right of individual students which is protected by the Due Process Clause of the Constitution.

(2) Even a short-term suspension cannot be imposed on a student without providing a minimum due process hearing for the student.[15]

School systems no longer can exclude students, even for a short period, without providing them with a hearing procedure. Neither can schools assign students to special education classes without affording them with appropriate due process procedures. While no case has been decided on by the Court requiring school systems to provide students with some form of due process hearing before assigning them to groups or tracks, the question of loss of property right could logically be raised when a student is assigned to a low group or to a track which removes him from the mainstream of the public school.[16]

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[15]Ibid., pp. 566-571.

[16]Chester M. Nolte, Due Process and Its Historical Development in Education, U. S. Educational Resources Information Center, ERIC Document ED 088 186 (April 1974) p. 14.

CASES CONTRIBUTING SIGNIFICANTLY TO THE ESTABLISHMENT OF CASE LAW IN AREAS OF TESTING, GROUPING, AND TRACKING

Hobson v. Hansen
269 F. Supp. 401 (D.D.C., 1967)

Overview

The widely publicized court decision affecting the assignment of students within a school was handed down in 1967 by Judge J. Skelly Wright in the Federal District Court of Washington, D. C. While this case dealt with a multiplicity of issues involving discrimination, the assignment of pupils within the school was the most important aspect of the case. For the first time ever, Hobson v. Hansen put to test the claim that ability grouping guaranteed equal educational opportunity by providing different programs according to the pupil's ability.

Facts

Prior to becoming superintendent of the District of Columbia School System, Carl Hansen, as Director of Instruction, had designed a four-track system in which students were assigned to classes according to scores received on academic and achievement tests. Later, as superintendent of the District of Columbia School System, Hansen found himself the defendant in a federal court case where one of the major issues was that the tracking system discriminated against non-white and poor children.[17]

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[17] Hobson v. Hansen, 269 F. Supp. 401 (D.D.C., 1967).

The plaintiffs in the case were parents of non-white children who were asking the court to issue an order ending several alleged discriminatory practices of the public school system.

The basic contention of the plaintiffs was that the tracking system, which assigned a disproportionate percentage of non-white and poor children to the lower tracks, was denying them of an equal educational opportunity. Specifically, the suit contained the following allegations:

(1) There was no remedial instruction provided for children in the lower tracks; hence, children assigned to these tracks had very little opportunity to move up.

(2) The curriculum in the lower tracks was very limited; the children placed in these tracks were stigmatized and were not receiving equal educational opportunities.

(3) The tests used to place students in tracks were biased because they were standardized on white, middle-class norms. The result was that many of the classes were resegregated.

(4) The self-image of students assigned to low tracks was damaged.

(5) Children assigned to the lower tracks were not expected to be able to do well in academic work; thus, teachers did not challenge students, and the result was a "self-fulfilling prophecy."[18]

Superintendent Hansen and the District School Board defended the tracking plan on the grounds that it did guarantee equal educational opportunities by providing different programs according to the students'

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[18]Ibid., p. 420.

abilities. Hansen said that the tracking program was "a legitimate educational response to the problems of disparity in achievements."[19] Hansen did admit, however, that the tracking system was initiated partially as an effort to minimize the impact of integration and to create a cushioning effect by which the parents of white children would not take their children out of the public schools.[20]

Evidence presented in this case documented the fact that the ratio of students assigned to tracks was directly related to the concentration of blacks and poor students in a particular school. The predominately black schools in the poor neighborhoods had a large number of students in the low tracks and in some cases had no honors track. The opposite was true in some predominantly white schools where very few children were assigned to the lower tracks. In racially-balanced schools, the top tracks were composed chiefly of children from middle-and upper-middle class white homes, while blacks and poor whites were predominant in the lower tracks.[21]

Decision

In a decisive ruling, Judge Wright permanently enjoined the District of Columbia School System from further operation of the track system as

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[19]Carl F. Hansen, The Four Track Curriculum in Today's High Schools (Englewood Cliffs: Prentice-Hall, 1964), pp. 7-8.

[20]Ibid., p. 9.

[21]Hobson v. Hansen, p. 490.

it existed at the time of the trial.[22] His decision was based on the following conclusions concerning the tracking program:

(1) Track assignments in the schools were significantly related to class and race.

(2) Track assignments had not been shown to be directly related to ability to learn.

(3) Track assignments significantly limited vocational choices.

(4) Track assignments did not allow students to move from the lower to the higher tracks.

(5) The lower track assignments did not include remedial reading programs for the students assigned to these tracks.

(6) Tests used to classify students were inappropriate for a large proportion of the black and poor white students in that they were standardized primarily on white, middle-class students.[23]

The Constitutional opinion as stated by Judge Wright is as follows:

> The sum result, when tested by the principles of equal protection and due process, is to deprive the poor and a majority of the Negro students in the District of Columbia of their Constitutional rights to equal educational opportunities.[24]

Discussion

While there was a decisive ruling on the questions of ability grouping, it left many questions unanswered and did not establish a clear legal precedent regarding this issue. Since Judge Wright specifically stated that his ruling applied only to this one situation

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[22]Ibid., p. 517. [23]Ibid., pp. 512-514. [24]Ibid., p. 511.

and that is should not be interpreted that all academic classifications were unconstitutional, the case left the future legal status of grouping and tracking unanswered. Regarding this issue, Judge Wright's rationale stated that:

> . . .not all classifications resulting in disparity are unconstitutional. If the classification is reasonably related to the purpose of the governmental activity involved and is rationally carried out, the fact that persons are thereby treated differently does not necessarily offend.[25]

The decision specifically stated that a school system could legally provide different kinds of students with different educational programs. The decision did, however, make it clear that any such programs must meet the following constitutional tests:

(1) Ability grouping must be reasonably related to the purposes of public education.

(2) Any system of grouping would have to include a compensatory educational component designed to bring the disadvantaged students into the mainstream of public education.

(3) Classification must be based on criteria that are not biased toward non-white and poor children. Tracking or grouping must not be based on social or economic status.[26]

The school system appealed the decision handed down by Judge Wright. The Court of Appeals affirmed the rulings of the District Court, but it did tone down the wording of the ruling, particularly as it related to judicial involvement in administrative prerogatives of local school officials. This Court went into some detail spelling out the fact

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[25]Ibid., p. 511.

[26]Ibid., pp. 512-514.

that the Courts would not become involved in matters of administrative prerogatives.[27] In the original ruling, Judge Wright had expressed regret that it had become necessary for the Court to involve itself in an area alien to its expertise, but he concluded that when constitutional rights are being challenged, the judiciary often must accept its responsibility to assist in finding a solution.[28]

The Court of Appeals did not address itself to the constitutional test of ability grouping outlined by Judge Wright. In later cases involving the question of ability grouping, this omission has become a judicial point of speculation and argument. In its zeal to assure school officials that the Courts did not wish to take over school officials' administrative prerogatives, the Court of Appeals also left some of the legal questions regarding testing and grouping unanswered.

Singleton v. Jackson Separate Municipal School District
419 F 2d., 1211 (Fifth Cir., 1970)

Facts

Several cases involving school desegregation orders were appealed to the Fifth Circuit Court of Appeals in December of 1969. Since these cases involved common questions of law and fact, the Court consolidated them for opinion purposes and heard them en banc on successive days. Many issues involving the establishment of a unitary school system were included in this case.

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[27]Smuck v. Hobson, 408 F. 2d., 186-188 (1969).

[28]Hobson v. Hansen at 517 (1967).

Of importance to this study is the section of the consolidated opinion dealing with testing and grouping, No. 28261--Marshall County and Holly Springs, Mississippi. The District Court had approved a desegregation plan to assign students in Marshall County and Holly Springs, Mississippi to various schools within the systems based on achievement test scores. The Justice Department appealed this decision based on the contention that such a plan denied minority students equal protection of the law and equal educational opportunity.[29]

Decision

Evidence reviewed by the Court revealed that both systems recently had been ordered to present an acceptable plan to end the dual school system. The Fifth District Court of Appeals rejected the plan whereby students would have been assigned to schools based on achievement test results. Said the Court:

> We pretermit a discussion of the validity per se of a plan based on testing except to hold that testing cannot be employed in any event until unitary school systems have been established.[30]

The Court reversed the lower courts' decision and sent it back to the District Court with instructions that the Board of Education be resuired to submit a desegregation plan which would comply with the Alexander v. Holmes ruling of the United States Supreme Court requiring immediate desegregation.

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[29]Singleton v. Jackson Municipal Separate School District, 419 F. 2d., p. 1219 (Fifth Cir., 1970).

[30]Ibid.

Discussion

Before giving opinions on the appeals in this consolidated case, the Fifth District Circuit Court of Appeals pointed out that the recent Supreme Court decision in Alexander v. Holmes had changed the entire status of litigation involving desegregation. No longer was the doctrine of "deliberate speed" applicable; the doctrine of immediate operation of unitary school systems was now the law of the land. As a result of this decision, the Court noted that all questions in the pending appeals were resolved except for the mechanics, and these were to be accomplished within the framework of immediacy laid down in Alexander v. Holmes.[31]

Armed with the Supreme Court's decision in Alexander v. Holmes, the Fifth Circuit Court of Appeals rendered a decisive decision barring the use of tests for purposes of assigning students in recently desegregated school systems. This ruling established a precedent which was used in several related cases between 1970 and 1975. While not specifically stating it, the Court implied that it would consider the validity of the testing issue in the future if it became an issue within a unitary school system.

Moses v. Washington Parish School Board
330 F Supp. 1340 (E. D. La. 1971)

Facts

Since 1953, the Franklinton, Louisiana white elementary school had used a form of tracking within a nongraded program based on achievement

[31]Ibid., 1216-1217.

and aptitude testing. The black elementary school, which had been closed by court orders in 1969, had used heterogeneous grouping in a traditional graded structure with no systematic achievement or aptitude testing.[32]

Following the Court order to close the black school in 1969, the black students were assigned to the former all-white school in Franklinton, making it 69 percent black. The school retained the classification system previously used in the white school with the exception that grouping was based on reading scores only instead of reading and math. The result of this grouping plan was that over 80 percent of the white students ended up in the top three sections of the eleven levels; 63 percent of all of the blacks were in the lower three sections, and the bottom three sections of each level were 100 percent black.[33]

The parents of some of the black students brought suit in the federal courts charging that the ability grouping plan of the Franklinton School violated the right of the black students to equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution. The plaintiffs requested that the school board be required to assign all students to heterogeneous, racially integrated classes and to adopt compensatory educational programs to remedy the effects of the previous discriminatory policies.[34]

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[32]Moses v. Washington Parish School Board, 330 F. Supp. 1340-1341 (1971) aff'd, 456 F 2d (1285 (Fifth Cir., 1972).

[33]Ibid., p. 1344.

[34]Ibid., pp. 1340-1341.

In presenting their case, the plaintiffs argued that the ability grouping plan at Franklinton Elementary School was a perpetuation of the results of past discrimination of the former dual school systems because of inferior educational opportunities in their previous school. This, they contended, was clearly a denial of equal educational opportunity and equal protection of the laws.[35]

The plaintiffs also contended that the homogeneous grouping plan at the Franklinton School resulted in segregated classes which were not educationally justified. Numberous educational experts presented testimony concerning the advantages and disadvantages of ability grouping, both for the defense and for the plaintiffs. This represented a significant departure from other cases involving school integration in that the Court considered educational philosophy and educational issues in arriving at a judicial decision.

Decision

Judge Frederick Heebe ruled that the plaintiffs had successfully challenged the use of ability grouping in a recently desegregated school system and ordered the reassignment of all the students to racially integrated classrooms. In arriving at this decision, Judge Heebe noted the inconclusiveness of the research regarding academic achievement and ability grouping. He also noted the lack of student movement from one group to another within the organization which resulted in a racial caste system where students tended to remain in the same system throughout the elementary school years.[36]

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[35]Ibid., p. 1343.

[36]Ibid., pp. 1340-1341.

The official opinion of the District Court regarding the use of testing is as follows:

> Without determining the per se validity of the use of such tests, the Court holds that testing, as presently used in Franklinton Elementary denies plaintiffs equal educational opportunity and impedes the immediate establishing of a truly unitary school as compelled by Alexander v. Holmes County Board of Education 396 U. S. 19, (1969), and has the effect of tending to preserve the dual system of education prohibited under Brown v. Board of Education, 347 U. S. 483 (1954).[37]

The Court referred to several Fifth Circuit cases banning the use of testing in recently desegregated school systems. The Court found that the probable motivation for the testing plan was to perpetuate school segregation and held that resegregation through testing was impermissible. This part of the opinion stated:

> . . .It is equally apparent, given the obvious reluctance and recalcitrance of school boards to establish unitary schools, that the school board in deciding to use testing, probably anticipated that most whites would score well and thus used testing to maintain as many segregated schools as permissible.[38]

Discussion

The concept of ability grouping was discussed by the Court in making its ruling. While not specifically ruling that this practice was unconstitutional, the Court did state its agreement with testimony that there was evidence of harmful effects of grouping upon low-ability children and that homogeneously grouped children usually do not achieve better than heterogeneously grouped children.[39]

The Court also noted that grouping students for all subjects based on test performance on a single test (reading) was the worst form of

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[37]Ibid., p. 1342. [38]Ibid., p. 1345. [39]Ibid., p. 1344.

homogeneous grouping.[40] The school board appealed Judge Heebe's ruling, but the Fifth Circuit Court of Appeals affirmed the District Court decision one year later.[41]

While this case went further than previous cases in discussing testing and ability grouping as these relate to equal educational opportunity and equal protection of the law, the decision did not declare these practices unconstitutional. The key portion of this ruling stated that testing for ability grouping purposes could not be used in recently desegregated school systems. This became a legal precedent which was used by various courts in cases involving similar issues. The implication of the Court in this decision was that it would not want to ban the use of these educational practices in the future if the school systems could present sufficient evidence that such practices were not discriminatory and that they were educationally sound.

Copeland v. School Board of City of Portsmouth, Virginia
464 F 2d 932 (1972)

Facts

Both the plaintiffs and the school board appealed an order of the United States District Court for the Eastern District of Virginia establishing a plan for the unitary operation of the school system of the City of Portsmouth, Virginia. While there were several issues involved

[40] Ibid., pp. 1342-1343.

[41] Moses v. Washington Parish School Board, 456 F. 2d. 1285 (Fifth Cir., 1972).

in the appeal relating to school desegregation, the ones included for discussion here concern the use of tests and examinations for assigning students to special schools.

Two formerly black-identified schools were being used by the school system as schools for students with special learning problems. One of these schools, Mt. Vernon, was used for retarded children, both black and white; while the second school, Reddick-Weaver, was used for students with specific learning disabilities.

The plaintiffs, who were parents of black students assigned to the schools, argued that the fact that over 75 percent of the students assigned to the special schools were black was sufficient evidence that the schools should be closed. There apparently was no inquiry by the plaintiffs into the reliability or relevance of the standardized tests used by the system in ascertaining retardation.[42]

The school system maintained that modern educational practices sustain the methods being used by the system for correcting learning problems and for offering better services to retarded children. The system further argued that all assignments were made without regard to race and on the basis of examinations administered by competent and professionally-trained personnel. Furthermore, the school system stated that a mentally retarded child, whether he be black or white, is better served by assignment to a special school where he can be given a form of education adopted to his capacity.[43]

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[42]Copeland v. School Board of City of Portsmouth, Virginia, 464 F. 2d., 933 (Fourth Cir., 1972).

[43]Ibid., p. 933.

Decision

The Fourth Circuit Court of Appeals held that when pupil assignments are made to special schools to benefit students with special learning problems, such assignments do not deny equal protection or equal educational opportunity merely because such schools are not racially balanced. Said the Court:

> Merely because there may be in any school system more mentally retarded black children than there are white, or vice-versa, is no reason for the discontinuance of a special school . . . . . Any other rule would mean the sacrifice of the student and his education to the single goal of absolute, inflexible racial balance.[44]

The Court ruled that while racial balance was not required by the Constitution, it was necessary to establish that the tests and examinations used in making assignments be relevant, reliable and free of discrimination. Therefore, the Circuit Court directed the District Court to determine whether the tests being used by the school system for assignment purposes met the above requirements.[45]

Discussion

Even though the plaintiffs had not questioned the validity of the tests and examinations being used by the Portsmouth City School System for assigning students to the two special schools, the Circuit Court of Appeals noted that this could very definitely be a consideration in this and other related cases. This portion of the discussion was significant in that it represented one of the few instances when a Federal Court addressed itself to the question of actual test validity as an issue in the equal protection question.

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[44]Ibid., p. 934.

[45]Ibid.

Serna v. Portales Municipal Schools
351 F. Supp. 1279 (1972)

Facts

Plaintiffs in this case were Spanish-surnamed children who were seeking an injunction against the Portales, New Mexico Municipal Schools requiring them to offer a specially designed curriculum for Spanish-speaking students. The plaintiffs contended that the school system had been discriminating against this class of students because the educational program did not satisfy their learning and social needs.[46] Thus, this case presented an issue which was the reverse of issues in other cases concerning discrimination; here, the plaintiffs were asking for special programs for a specific group of students to be in the same program.

The facts of the case revealed that Lindsey Elementary School had a Spanish-surnamed population of 86.7 percent in the 1971-1972 school year, while the other three schools in the district had a Spanish-surnamed population of from 12 to 22 percent. The major contention of the plaintiffs was that the Portales school system was tailored to educate the middle class from English-speaking families without regard to the needs of Spanish-speaking families.[47]

Evidence presented in the case showed that achievement and intelligence test scores for children at Lindsey School were considerably lower than were the scores for children at other schools.

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[46]Serna v. Portales Municipal Schools, 351 F. Supp. 1279 (D. C. New Mexico, 1972).

[47]Ibid., p. 1281.

Decision

The District Court for New Mexico ruled that the school system was not providing the specialized program needed to meet the needs of the minority students. The Court said that 'It would be a deprivation of equal protection for a school district to effectuate a curriculum not tailored to the educational needs of the minority children."[48] The school system was given ninety days to present plans for remedial education to correct inequities in the educational program identified by the Court.

Discussion

There was no contention by the Plaintiffs that the education program was poorer in the school with the high percentage of Spanish-speaking students than in the other schools; the issue in this case was that the educational program needed to be different for students whose needs were different. By agreeing with the plaintiffs, the Court established a new dimension to the issues of discrimination and denial of equal educational opportunity: educational programs have to be different in schools within the same system if the students' needs are significantly different.

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[48]Ibid., p. 1283.

McNeal v. Tate County School District
508 F. 2d 1017 (1975)

Facts

The United States District Court for the Northern District of Mississippi approved the Tate County School System's desegregation plan, which included assigning students to classrooms based on ability. The District Court reasoned that recent decisions of the Supreme Court which allowed for some segregated classrooms in certain metropolitan systems had superseded decisions rendered by Federal District and Circuit Courts.[49]

The classroom assignment plan was based on teacher evaluation of the pupil's past performance, with the principal making the final decision. The Tate County School System had an enrollment of 2152 black students and 1367 white students in five schools.

Evidence presented to the Court revealed that the student assignment plan had produced from one to four all-black sections in every elementary grade (1-6) and a few all-white sections in the advanced grades. Evidence also showed that a number of the all-black classrooms were taught by black teachers.[50]

The parents of some of the black students appealed the District Court's ruling claiming that this decision violated the court's initial order enjoining the maintenance of segregated classrooms. The plaintiffs also asked the Court to require that the racial ratio in each classroom reflect the ratio in the respective grade.[51]

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[49] McNeal v. Tate County School District, 508 F. 2d, 1019 (Fifth Cir., 1975).

[50] Ibid., p. 1018.

[51] Ibid., p. 1019.

Decision

The Fifth Circuit Court of Appeals reversed the lower court's decision. The Court held that an assignment plan based on ability or achievement grouping which resulted in racially segregated classrooms could not be used by a system until it had operated a unitary system without ability-grouped classrooms for a period of time sufficient to assure that the underachievement of the slower groups was not due to educational disparities caused by prior segregation.[52] In arriving at this decision, the Court reviewed the judicial rationale established in Singleton v. Jackson (1970) and in Lenon v. Bossier (1971) that the validity of using tests for classroom or school assignment purposes could not be considered until the system had operated as a unitary system for several years. In this case, the Court noted that black students had never been allowed to attend a unitary school system where ability grouping was not used.

The Court stated that the judicial ban on ability grouping could be lifted when a school system could show it had taken the necessary steps to end the educational disadvantages caused by prior segregation.[53]

Since the decision in this case summarized many of the key points made by various courts in related cases, a portion of the ruling is included below:

> Ability grouping, like any other non-racial method of student assignment, is not constitutionally forbidden. Certainly educators are in a better position than courts to appreciate the educational advantages or disadvantages of such a system in a particular school or district. School districts ought to be,

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[52]Ibid.

[53]Ibid., p. 1021.

> and are, free to use such grouping whenever it does not have a racially discriminatory effect. If it does cause segregation, whether in classrooms or in schools, ability grouping may nevertheless be permitted in an otherwise unitary system if the school district can demonstrate that its assignment method is not based on the present results of past segregation or will remedy such results through better educational opportunities.[54]

Discussion

As was the case in similar cases several years earlier, the Fifth Circuit Court of Appeals did not get into the educational arena with this decision. The fact that the Court specifically stated that even ability grouping resulting in segregated classrooms was permissible if the school system could prove that such programs would result in better educational opportunities shows that the Court wanted to maintain its distance from strictly educational decisions.

Vorchheimer v. School District of Philadelphia
532 F. 2d 880 (1976)

Facts

A female high school student who had been denied admission to an all-male academic high school because of sex brought a class action to challenge this alleged constitutional discrimination. An injunction was granted by the United States District Court for the Eastern District of Pennsylvania, and qualified female students were ordered to be admitted to the all-male school.[55]

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[54]Ibid., p. 1020.

[55]Vorchheimer v. School District of Philadelphia, 532 F. 2d 880 (Third Cir., 1976).

The District Court order was appealed by the school district to the Third Circuit Court of Appeals.

Decision

The question before the Court of Appeals was whether or not the denial of the right to attend the all-male school was a denial of the equal protection clause of the Fourteenth Amendment of the United States Constitution. The Court said it had to determine if the Constitution and laws of the United States require that every public school in the nation be coeducational.[56]

After reviewing the evidence, the Court of Appeals reversed the judgment of the District Court and held that where attendance at either of two single-sex high schools was voluntary, and the educational opportunities offered were essentially equal, the admission requirements based on gender were not unconstitutional.[57]

This case was appealed to the United States Supreme Court where the decision of the Appeals Court was affirmed.

Discussion

The Court found that there was no evidence that the all-male school offered a superior academic program to that offered at the all-female school. Since attendance at either of the special schools was voluntary, the Court could find no reason to rule that the admission requirement of gender was a denial of the equal protection clause.

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[56]Ibid., p. 881. [57]Ibid., p. 885.

The Court was careful not to get involved in educational philosophy. The Court noted that if its ruling allowed the plaintiff to attend the all-male school, all single-sex schools would have to be abolished, and this would deny parents and students who prefer an education in such schools that opportunity.[58] It should be noted that this court continued the precedent established by the other courts in refusing to get involved in administrative issues which it deemed to be the sole responsibility of the school system. The summary statement of the order illustrates this point.

> It is not for us to pass upon the wisdom of segregating boys and girls in high school. We are concerned not with the desirability of the practice but only its constitutionality. Once that threshold has been passed, it is the school board's responsibility to determine the best methods of accomplishing its mission.[59]

Everett v. Marcase
426 F. Supp. 397 (1977)

Facts

A recent case which involved an issue similar to tracking was heard by the United States District Court for the Eastern District of Pennsylvania in January of 1977. The plaintiffs in this case were parents of students who had been "laterally" transferred from one school to another in Philadelphia. The parents brought suit challenging that the system had no specific due process guidelines to use in making

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[58]Ibid., p. 888.

[59]Ibid., p. 888.

the transfers. The suit asked the Court to compel the Philadelphia School District to adopt specific procedures which would guarantee procedural due process for any students before they could be transferred to a different school.[60]

The school system took the position that no cognizable property rights had been denied the plaintiffs and that the "lateral" transfers did not amount to punishment; therefore, the school district contended that no procedural due process rights were required.[61]

Decision

The District Court ruled that even though the transfers may in certain specific instances be for the good of the pupil, it nevertheless bears the stigma of punishment. The Court ruled that such transfers did involve protected property interests of the pupils of sufficient significance to warrant the skeleton of due process protection.[62]

In arriving at the decision in the Everett v. Marcase case, the District Court Judge used the Goss v. Lopez decision as the legal precedent for requiring minimal due process proceedings. In Goss, the United States Supreme Court ruled that a student must be afforded a minimal due process hearing before he could be suspended, even for a short period. In Everett v. Marcase, the Court reasoned that the "lateral" transfers of students were at least as important to the student as short-term suspension, and therefore, due process must be afforded students before they can be transferred to another school.[63]

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[60] Everett v. Marcase, 426 F. Supp. 397 (D. C. East Dist. Pa. 1977).

[61] Ibid., p. 398. [62] Ibid., p. 400. [63] Ibid.

Discussion

Since the assignment of students to specific tracks within a school results in some of the same stigmas as does a forced transfer to another school, minimal due process protection could be required for students being assigned to low tracks or groups. If a legal challenge is raised on the issue of track assignment without due process, it could be supported by the contention that students in the low groups and low tracks often do not receive training necessary for obtaining high-paying jobs or for admission to college--hence, the issue of denial of equal educational opportunity as a result of track assignment without due process of law could be a litigious issue in the future.

CASES RELATED TO RACIAL AND SEX DISCRIMINATION AND TO THE USE OF STANDARDIZED TESTS

Miller v. School District Number 2, Clarendon County, South Carolina 256 F. Supp. 370 (1966)

Facts

The main issue in this case was the right of parents of minority children to transfer their children to formerly all-white schools. The county's desegregation plan contained restrictive provisions for allowing school transfers, provisions which became the basis for this litigation.

Other questions raised by the plaintiffs included whether or not a school system could group students according to ability or achievement

and whether or not local districts had to adhere to all of the desegregation guidelines established by the Office of Health, Education, and Welfare.[64]

Decision

The United States District Court for the District of South Carolina ruled that the county's restrictive plan for allowing freedom of choice transfers was not in keeping with the spirit of the law requiring school systems to end all vestiges of school desegregation.

Concerning the issue of separating classes into accelerated and slow groups, the Court ruled that such practices were proper and that such decisions were matters solely for educators. The Court stated that "discrimination" based on educational need was not a constitutional question, but that it is "racial discrimination" in public education which must be removed.[65]

Discussion

The Court attempted to make a distinction between racial discrimination and legitimate educational discrimination in this decision. However, since no further clarification or distinction was made by the Court regarding what it meant, the case did not provide educators with any relevant guidelines regarding academic grouping practices.

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[64]Miller v. School District Number 2, Clarendon County, South Carolina, 256 F. Supp. 370 (D. C. S. C. 1966).

[65]Ibid., p. 375.

U. S. v. Choctaw County Board of Education
417 F. 2d. 838 (1969)

Facts

The United States District Court for the Southern District of Alabama had ruled against black parents who were seeking total integration of the Choctaw County public schools. The Court's reasoning was that it would create violence and turmoil and that it would not work effectively at that time. The plaintiffs appealed this decision to the Circuit Court of Appeals.

The issues of the case were whether or not a "freedom-of-choice" plan or a zoning plan are constitutional if they do not result in significant school integration. Also at issue was whether school desegregation could justifiably be delayed on the grounds that black children had lower educational levels than did white children at the same age or grade level.[66]

Decision

The Court of Appeals reversed the District Court's decision and ordered the school system to submit a new plan for desegregation that would immediately eliminate all-Negro schools. The Court gave the system the following specific guidelines:

(1) School Boards have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system.

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[66]U. S. v. Choctaw Board of Education, 417 F. 2d. 838 (D. C. So. Dist. Ala. 1969).

(2) The dual system must be liquidated "lock, stock, and barrel"--students, teachers, staff, facilities, transportation, and school activities.

(3) The only school desegregation plan that meets constitutional standards is one that works immediately to end segregation.[67]

The decision further stated that school desegregation could not be delayed because Negro pupils had lower educational levels than whites in the same grade level.[68]

Discussion

While this case did not directly address the subject of ability grouping, it did help to establish the legal principles for later cases that were directly related to grouping. The Court of Appeals made it clear in this decision that it was not the desire of the Courts to scrutinize the internal operations of the schools and that if school systems would face up to their responsibilities of affirmatively bringing about total school integration, the Courts would gladly retire from the school business.[69]

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[67]Ibid., p. 842. [68]Ibid., p. 839. [69]Ibid., p. 839.

United States of America v. Board of Education of Lincoln County
301 F. Supp. 1024 (1969)

Facts

The Lincoln County, Georgia, School System operated two twelve-grade schools. In 1968, each school was completely segregated with 698 white pupils in one school and 945 Negro pupils in the other school. The United States Attorney General and some parents of black students initiated a suit seeking to enjoin the Board of Education from operating a dual school system.[70]

Decision

The decision of the United States District Court for the Southern District of Georgia was to order the school system to take whatever steps necessary to convert the district into a unitary system in which all vestiges of discrimination would be eliminated.[71]

The Court specifically rejected as irrelevant the testimony of two college professors which claimed that tests given to all students in the schools revealed a performance gap between black and white students that would cause serious educational problems should the system have to integrate its schools. Regarding this issue, the Court stated:

> Under latter day Fourteenth Amendment interpretation, scholastic aptitude means nothing. Total integration of the schools, regardless of the consequences to the system, is all that

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[70] United States v. Board of Education of Lincoln County, 301 F. Supp. 1024 (D. C. So. Dist. Ga. 1969).

[71] Ibid., p. 1028.

> counts. The higher courts apparently look no further. If a lower court were to do so, it would be met by an argument that it is impermissible to allow the school boards to assert the educational results of past discrimination as justification for continuation thereof.[72]

Discussion

This district court case is included for review and analysis because it was one of the earlier cases to establish the legal principle that educational results of past discrimination may not be used as justification for the continuance of the same practices. This principle has since been used by numerous other courts in cases containing issues related to ability grouping.

It is also significant that the Court ruled that the results of ability tests were irrelevant. Test results had indicated the existence of a wide range of abilities between white and black students. The psychologists who had administered the tests had recommended that a tracking system would be the best plan for integrating the schools. Based on the test scores, this would have resulted in very little classroom integration. Not only did the Court reject the tracking proposal, it ruled that the test discussion, itself, was not valid in a case involving school integration.[73]

Moore v. Tangipahoa Parish School Board
304 F. Supp. 244 (1969)

Overview

While this case is not specifically concerned with the question of ability grouping and testing, it is an important case in a series of

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[72]Ibid., p. 1029

[73]Ibid., p. 1030.

court decisions dealing with constitutional questions of student assignment. It is included for discussion here because portions of the ruling were later applied to cases which were specifically concerned with grouping and testing issues.

Facts

In October of 1968, the District Court for the Eastern District of Louisiana ordered the largely segregated Tangipahoa Parish School Board to come up with a plan for the unitary operation of its schools for the 1969-1970 school year. The Board reported to the Court in November of 1968 that it was unable to find a better plan than the "freedom of choice" plan then in use. Under this plan, more than 96 percent of the Negro students were attending all-black schools. The Court disagreed with the school board and ordered them to seek outside assistance in drawing up a new plan.[74]

The school board apparently disregarded the outside consultant's integration plan and presented a new plan which would phase out freedom of choice plans over a three-year period. The plan called for the principal to be responsible for actual classroom assignments of individual students with the implication that there might be all-white classes and all-black classes within the same school. The plan also called for the separation of boys and girls into separate schools in one section of the county.[75]

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[74]Moore v. Tangipahoa Parrish School Board, 304 F. Supp. 244 (D. C. East Dist. La. 1969).

[75]Ibid., p. 249.

Decision

The Court did not accept the new plan of the school board and issued a comprehensive order giving the school system specific instruction concerning the desegregation of the schools. The part of the order that relates to academic grouping states:

> All classroom assignments shall be made on a racially nondiscriminatory basis and in such a manner that no class is racially identifiable.[76]

In explaining the ruling, the Court made it clear that students could be classified by the school system so long as the criteria for the classification was not racially discriminatory. The Court said, however, that the burden of proof that tests or other criteria selected for classification purposes were free from racial bias clearly rested with the school system.[77]

Discussion

In this case, the Court attempted to establish a clear distinction between its duty to protect the constitutional rights of all students and the administrative prerogatives of the school board. The following specific judicial opinions about the relationship of the courts to the local schools were included in the decision:

(1) The court recognizes the right of the school board to run the schools, and it should be afforded every opportunity to do so as long as it guarantees every child equal protection of the law.

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[76]Ibid., p. 252.

[77]Ibid., p. 249.

(2) The court will never alter particulars of a school desegregation plan submitted by a local school board merely because the particulars appear to be administratively awkward.

(3) Local plans may be defective in educational principles, or require alteration after a trial period, but local boards must be free to experiment within constitutional grounds.

(4) It is proper that classroom assignments be made by the individual school principal so long as these assignments are made in a nondiscriminatory fashion and so long as the assignments do not result in racially identifiable classes.[78]

References to these judicial opinions have been made several times by various courts in cases involving questions of testing, grouping, and classifying students.

U. S. v. Tunica County School District
421 F. 2d. 1236 (Fifth Cir., 1970)

Facts

The school system in Tunica, Mississippi traditionally had operated two white schools (grades 1-6 and 7-12) and two all-Negro schools (grades 1-8 and 1-12), serving 555 white pupils and 3,155 Negro pupils respectively. Since the school system's "freedom of choice" attendance plan had resulted in very little school integration, the District Court ordered the school board to submit a new integration plan.

The school board responded by submitting a new "freedom of choice" plan and an alternate plan whereby students would be assigned to schools

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[78]Ibid., pp. 247-248.

based on achievement test scores. Students in four grades would be tested per year, with the highest scoring students assigned to the predominantly white schools and all others to the Negro schools.[79]

The United States District Court for the Northern District of Mississippi approved the three-stage plan for pupil assignment based on achievement test scores. Both the school board and the United States Justice Department appealed the ruling. The school board maintained that the Court should have approved the new "freedom of choice" plan; the Justice Department contended that the achievement test assignment plan violated the equal educational opportunity rights of minority children.[80] The Fifth Circuit Court of Appeals reviewed the case and rendered its decision in 1970.

Decision

The Fifth Circuit Court of Appeals concluded that the facts in this case were identical to those in the Marshall County case (Singleton v. Jackson 1970) and ordered the judgment of the District Court reversed and remanded for further proceedings.[81] The Court of Appeals also instructed the District Court to order the school board to submit a new desegregation plan complying with all of the provisions of the Singleton ruling.[82]

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[79]U. S. v. Tunica County School District, 421 F. 2d. 1236 (Fifth Cir. 1970); cert. den., 398 U. S. 951 (D. C. N. Dist. Miss. 1970).

[80]Ibid., p. 1237. [81]Ibid., p. 1237.

[82]Singleton v. Jackson, 419 F. 2d. 1219 (1970).

Discussion

The Fifth Circuit Court determined that the Tunica County School Board was simply trying to avoid its constitutional duty to establish and operate a unitary school system. The Court noted that the doctrine of immediate integration had been firmly established by the United States Supreme Court in Alexander v. Holmes (1969) and that attempts to delay and/or circumvent compliance would not be tolerated by the Court.

The question of the right of a school system to use tests to determine pupil assignment was not discussed by the Court except as it referred to the portion of the Singleton ruling regarding tests. Here the Court had stated:

> We pretermit a discussion of the validity per se of a plan based on testing except to hold that testing cannot be employed in any event until unitary school systems have been established.[83]

United States v. Sunflower County School District
430 F. 2d. 839 (1970)

Facts

The United States Justice Department asked the District Court to order the Sunflower County School Board to terminate its dual school operation at the close of the 1970 school year. The school system had been assigning students based on achievement test scores with the result that over 95 percent of the Negro students continued to attend schools that were essentially all Negro.

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[83]Ibid., p. 1221.

The District Court ordered the School Board to rescind its practice of assigning students to schools based on achievement test results. The order further stated that all aspects of the dual school system were to be terminated and a unitary school system established immediately as required by the United States Supreme Court decision in Alexander v. Holmes County Board of Education (1969).[84]

The District Court's ruling was appealed by the Sunflower County School Board, and the case was reviewed by the Fifth Circuit Court of Appeals.

Decision

The Court of Appeals rejected the school board's appeal and affirmed the action of the District Court. The Court ruled that the District Court had indeed issued a clear and concise order which was in accordance with the decision of the U. S. Supreme Court and with the Singleton decision previously issued by the Fifth Circuit Court of Appeals.[85]

Spangler v. Pasadena County Board of Education
311 F. Supp. 501 (1970).

Facts

The plaintiffs in this case were the parents of a nonwhite child who were seeking to force the Pasadena, California, School District to change its school assignment plan so that it would result in more racial balance in the schools.

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[84]United States v. Sunflower County School District, 430 F. 2d. 839 (Fifth Cir., 1970).

[85]Ibid., p. 840.

While there were several issues involved in this desegregation case, the one relating to the topic of this study concerned ability grouping. Students in the secondary schools were grouped in fast, regular, and slow sections, with the result being that larger numbers of black students were assigned to the lower sections. The grouping was based in part on scores the students made on achievement and intelligence tests and on teacher and counselor recommendations. Parents also could request that their children be assigned to a particular section.[86]

Decision

The case was heard by the United States District Court for the Central District of California. The Court ruled that the practice of ability grouping used by the school system which resulted in racially imbalanced classes was a violation of the equal protection clause of the Fourteenth Amendment. Said the Court:

> Under the Fourteenth Amendment a public school body has an obligation to act affirmatively to promote integration, consistent with the principles of educational soundness and administrative feasibility.[87]

The Court said that when school officials make educational policy decisions based wholly or in part on considerations of the race of the students or teachers which result in increased racial segregation within the system or within the school, then this is evidence that a violation of the Fourteenth Amendment has occurred.[88]

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[86] Spangler v. Pasadena County Board of Education, 311 F. Supp. 501 (D. C. Cent. Dist. Calif., 1970).

[87] Ibid., p. 521.

[88] Ibid.

Lemon v. Bossier Parish School Board
444 F. 2d. 1400 (Fifth Cir. 1970)

Facts

The United States District Court for the Western District of Louisiana approved a school desegregation plan for the Plain Dealing Louisiana School System which allowed the system to assign students in grades 4-12 to one of two schools on the basis of scores made on the California Achievement Test. The plaintiffs appealed this decision, contending that such a plan was not in compliance with legal principles established by the Supreme Court and the Court of Appeals.[89]

Decision

The Fifth Circuit Court of Appeals rejected the lower court's decision and remanded the case to the District Court with instructions to have the school system rewrite the student assignment plan. The Court of Appeals stated that the plan of assigning students based on achievement test scores was obviously not in compliance with previous orders of that Court in school desegregation cases.[90] Specifically, the Court referred to the precedent case of Singleton v. Jackson (1970), which held that the Court would not even discuss the question of testing in a recently desegregated school system.[91]

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[89]Lemon v. Bossier Parrish School Board, 444, F. 2d. 1400 (Fifth Cir., 1970).

[90]Ibid.

[91]Singleton v. Jackson, 419 F. 2d. 1219 (Fifth Cir., 1970).

The Court noted that it had repeatedly rejected testing as a basis for student assignment since the Singleton decision and that it saw no reason to depart from this ruling in this particular case. Since the Plain Dealing School System had been operating as a unitary system for only one semester, the Court reasoned that this was insufficient time to raise the issue of the validity of testing.[92]

Discussion

While this case is very similar to previously reported cases from the Fifth Circuit Court of Appeals, it does go a step further in clarifying some of the issues left unsettled by the Court in previous cases. For example, the school systems wanted to know how long the Court would require a school system to operate as a unitary system before allowing it to assign students based on test scores. In this case, the Court said that as a minimum the district in question would have to operate as a unitary system for several years before attempting to implement such a plan.[93]

As in previous cases, however, the Court again declined to rule on the validity of testing per se. Regarding this issue, the Court stated:

> When a school district that has operated as a unitary system for a sufficient time raises the issue, we will then decide that complex and troubling question which, suffice it to say, is not simplistic.[94]

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[92] Lemon v. Bossier Parish School Board, op. cit., p. 1401.

[93] Ibid.

[94] Ibid.

Thus, this Court was able to continue the policy established by the Supreme Court in Alexander v. Holmes (1970) and by other District Courts in related desegregation cases of not getting involved directly in educational issues.[95] By sticking to the equal protection question and the equal educational opportunity issue, the Court was able to postpone its direct involvement in educational issues.

United States v. State of Texas
342 F. Supp. 24 (E. D. Texas, 1971)

Facts

The San Felipe Del Rio Consolidated Independent School District included many students who were classified as Mexican-Americans. This case originated as an effort to get the Court to declare the Mexican-American or Spanish-surnamed Americans to be a separate and distinct national origin group so they could receive benefits of class action rulings of the Court and receive the protection afforded a class of people by the Civil Rights Act.

Specifically, the plaintiffs, who were parents of Mexican-American students, wanted the school system to provide a curriculum that would be relevant to the unique needs of the minority children.[96]

Decision

The District Court ruled that the Mexican-American students did constitute a distinct, identifiable ethnic-minority group, and that

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[95]Moore v. Tangipahoa Parrish School Board, op. cit., p. 145.

[96]United States v. State of Texas, 342 F. Supp. 24 (D. C. East Dist. Texas, 1971).

as such, they were entitled to all judicial protections afforded other racial and ethnic minority groups.

The Court ruled that the San Filipe Del Rio School District must create a unitary school system with no Mexican schools and no white schools but just schools.[97] The Court noted that the United States Supreme Court had not specifically defined a unitary school system beyond saying it is one that offers equal educational opportunities to all students[98] and one that offers the greatest amount of desegregation possible.[99] Since no specific definitions of a unitary system had been provided by previous court decisions, the District Court proceeded to give the school district specific instructions as to what it should do in order to satisfy the unitary school system requirement. Some examples of the Court's order follow:

(1) Modify the curriculum design in order to provide for the linguistic pluralism of the student body;

(2) Use the child's native language for instructional purposes;

(3) Implement an individualized instructional program within the context of completely heterogeneous classrooms;

(4) Provide for special educational needs of migrant children through special groupings not to exceed one hour of the school day.[100]

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[97] Ibid., p. 27

[98] Alexander v. Holmes County Board of Education, 396 U. S. 19 (1969).

[99] Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1 (1971).

[100] U. S. v. State of Texas, op. cit., pp. 32-34.

Discussion

Whereas previous decisions were criticized by school officials for not providing more explicit guidelines or definitions for unitary school systems, this decision was the complete opposite in that it spelled out in minute detail how the school system should be organized and what the program should be.

Previous court decisions had contained statements to the effect that the courts did not wish to become involved in the internal school processes. In this instance, however, the Court apparently felt that the constitutional rights of the minority students could best be protected by the specific court-ordered desegregation plan.

Singleton v. Anson County Board of Education
C. A. No. 3259 (W. D. of N. C. 1971)

Facts

This school desegregation case involved a number of related issues including faculty assignments, location of new schools, promotion of employees, and in-school segregation. The case was heard by Judge James McMillan, who had recently been directly involved in the U. S. Supreme Court case of Swann v. Charlotte-Mecklenburg Board of Education.

The related issue in this case is that of in-school segregation. Evidence revealed that as many as thirty of the 155 classes in the Anson County schools were all-black and that several of these resulted from the practice of assigning pupils to classes based on ability of achievement.[101]

[101] Singleton v. Anson County Board of Education, C. A. No. 3259 (W. D. of N. C. 1971).

Decision

Judge McMillan ruled that the Anson County School System would have to make several changes in its school desegregation plan in order to comply with the Constitutional principles established by the Supreme Court in the Swann v. Charlotte-Mecklenburg case. Regarding the issue of ability grouping and in-school segregation, the Court said:

> Ability grouping, or the so called "track-method," may have academic justification and may be an educational rather than a constitutional issue, but. . .is suspect when it first begins to flourish on the eve of or during a desegregation suit.[102]

The Court directed the school system to disallow in-school separation caused by ability grouping plans, ESEA guidelines, or any other such justifications except for that portion of the school day required for the ad hoc classes. During the rest of the school day the classes were to be composed of a mixture of all of the students at a given age level. Judge McMillan made it clear that HEW guidelines did not supersede the constitutional rights of the students.[103]

Murray v. West Baton Rouge Parish School Board
427 F. 2d. 438 (1973)

Facts

The plaintiffs in this case were black students in the West Baton Rouge Parish public schools who were challenging the constitutionality of (1) the Louisiana public school disciplinary statutes; (2) the rules and regulations of the Port Allen High School; and (3) the system of

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[102]Ibid.

[103]Ibid.

psychological testing used in the elementary schools. A complaint was filed with the District Court for the Eastern District of Louisiana which asked for declaratory and injunctive relief. The suit alleged that certain rules and practices of the school board were unconstitutional. The District Court, however, dismissed all of the plaintiff's complaints, whereupon the case was appealed to the Fifth Circuit Court of Appeals.[104]

Decision

In each of the three challenges, the three-Judge Court of Appeals found that the plaintiffs had totally failed to prove a deprivation of any Constitutional rights.

In the issue relating to psychological and achievement testing, the plaintiffs had alleged that the tests were being used to discriminate against black students. The Court concluded that there was absolutely no evidence that the testing was being used to foster segregation in the classroom, nor was there any evidence that the tests were being administered in a discriminatory manner.[105]

Discussion

As had been the case in previous decisions of the Fifth Circuit Court in cases relating to the use of tests, the Court was very careful not to infringe upon the administrative prerogatives of the local school district. The Court stated:

> . . . the Constitution is not fenced out of the school grounds, but that every barb felt by students or parents in the school

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[104]Murray v. West Baton Rouge Parrish School Board, 427 F. 2d 440 (Fifth Cir., 1973).

[105]Ibid., p. 444.

> fence is not constitutionally offensive. ...For better or for worse, our jurisdiction attaches only when the Constitution has been violated--not every time a principal acts arbitrarily or unfairly.[106]

In essence, the Court was saying that its decision to dismiss the plaintiffs' claims did not mean it was placing its approval on the testing practices of the school system. The Court felt that the wisdom and propriety of such decisions should be left to the good judgment of the school officials; only if the plaintiffs could prove a deprivation of any constitutional right would the Court intervene.[107]

Morales v. Shannon
516 F. 2d. 411 (Fifth Cir., 1975)

Facts

The plaintiffs in this case were Mexican-American parents who challenged a Texas elementary school district's neighborhood school assignment plan. The defendant in the case was E. P. Shannon, principal of the Robb Elementary School in Walde County, Texas.

The United States District Court for the Western District of Texas had ruled that the school's class assignment plan was not discriminatory and that there was no segregatory intent in the system's school assignment plan. The plaintiffs then appealed their case to the Fifth Circuit Court of Appeals.

Evidence presented to the Court revealed that the assignment plan had resulted in a high concentration of Mexican-American students in two elementary schools and a rather high percentage of Mexican-American

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[106]Ibid., p. 445.

[107]Ibid.

students in the low sections in all of the schools. The Court found that the ability grouping plan was based on both language and math standardized test scores, as well as past academic grade performance and teacher judgment.[108]

Decision

The Court of Appeals found that the system's neighborhood assignment plan for students, coupled with the freedom of choice plan, did result in segregatory intent. Thus, the Court remanded that section of the suit to the District Court with instructions that the system prepare a new student assignment plan.[109]

On the question of ability grouping for class assignment, the Court of Appeals found no grounds for the plaintiffs' contention that this plan was intentionally discriminatory. The Court determined that since the school system had not used ability grouping for four years in the otherwise unitary school system, this was a legitimate educational plan designed to give students a better educational opportunity. The element of "intent to segregate" by administrative action was not proven by the plaintiffs.[110]

Discussion

In a long series of cases involving classroom assignment plans based on ability grouping, the Fifth Circuit Court of Appeals consistently had ruled against such practices if they resulted in segregated classrooms, or if such practices were instigated shortly after court orders

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[109]Ibid., p. 414.

[110]Ibid., p. 415.

requiring the establishment of unitary school systems. In almost every one of these cases, however, beginning with the Moore v. Tangipahoa Parish School Board in 1969, the Court had insisted that it did not wish to make educational decisions. At the same time, the Court had stated that judicial decisions regarding the grouping of students could be made after several years of operation of a unitary school system where ability grouping was not practiced. Thus, this case represented a culmination of numerous decisions rendered by the Fifth Circuit Court over a period of several years; finally, the court handed down a ruling which it had been predicting it would make when and if the circumstances mandated it.

In arriving at this decision, the Court referred to the "case law" on the issue of grouping that was established by the decision in McNeal v. Tate earlier in 1975. Here, the Court had stated that ability grouping was not constitutionally forbidden and that educators were in a far better position than were the courts to make such educational decisions. That decision also included a declaration to the effect that even if the grouping plan resulted in some classroom segregation, it could still be permitted in an otherwise unitary system if the plan was not based on results of past segregation and if it would remedy such results by providing better educational opportunities.[111]

While the legal principle had been established in McNeal v. Tate, the Morales v. Shannon decision represented the first time the Fifth Circuit Court had approved any classroom assignment plan based on ability grouping which resulted in resegregating some classrooms.

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[111]McNeal v. Tate County School District, 508 F. 2d, p. 1020 (Fifth Cir. 1975).

Board of Education, Cincinnati v. Department of HEW
396 F. Supp. 203 (Ohio, 1975)

Facts

The United States Department of Health, Education and Welfare had notified the Cincinnati Board of Education that the school system was no longer eligible for emergency school desegregation funds (ESAA). The reason given by Health, Education, and Welfare officials was that the school system was using grouping practices which were in violation of the agreement the school system had signed when they accepted the Emergency School Aid Act funds. Upon receipt of this notification, the Cincinnati Board of Education initiated legal action against the Department of Health, Education, and Welfare to restore the funds. The suit also alleged that the Secretary of the Department of Health, Education, and Welfare had exceeded his discretionary power in establishing rules and regulations governing school organization.[112]

Decision

The decision of the District Court for the Southern District of Ohio was to uphold the decision of the Department of Health, Education, and Welfare to terminate funds to the school system. The Court ruled that the Secretary of Health, Education, and Welfare had not abused his discretionary power in approving the guidelines governing school organization, and that the decisions of the Department officials were neither arbitrary, capricious, nor an abuse of their authority.[113]

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[112]Board of Education, Cincinnati v. Department of HEW, 396 F. Supp. 203 (D. C. Ohio, 1975).

[113]Ibid., p. 219.

Discussion

The specific part of the regulation governing emergency desegregation funds which Health, Education, and Welfare officials said the Cincinnati School Board was violating had to do with racially-identifiable schools and classrooms. The rule states:

> No educational agency shall be eligible for assistance under this chapter if it has . . . in effect any procedure for the assignment of children to or within classes which results in the separation of minority groups from non-minority groups of children for a substantial portion of the school day, except that this clause does not prohibit the use of a bona-fide ability grouping by a local educational agency of a standard pedagogical practice.[114]

Evidence was presented to the Court showing that "several hundreds of students were assigned to racially identifiable classes for which no educational justification has been furnished."[115] The Court noted that the school system could have separated minority from non-minority children for a portion of the day which would have allowed for "bona fied" ability grouping, provided the grouping was based upon nondiscriminatory objective standards of measurement which were educationally relevant to the purposes of such grouping. Other regulations concerning such groupings outlined by the Court included a prohibition against using tests which primarily measure English language skills for national origin minority-group students; a provision that such grouping be maintained only for the portion of the day necessary to achieve the purposes of the grouping; proof that the program of instruction was designed to meet the special needs of the students in each group; and a provision

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[114]Ibid., p. 220.

[115]Ibid.

for evaluation based on test scores or other reliable objective evidence indicating the educational benefits of such grouping procedures.[116]

The Court affirmed the principle of law established by earlier court decisions that grouping and tracking are legitimate educational conventions which can be employed so long as they are not subterfuges for racial discrimination.[117]

The rather extensive decision and accompanying discussions contained in this case furnish school officials with some sound principles and guidelines for making decisions regarding ability grouping.

Lau v. Nichols
414 U. S. 563 (1974)

Facts

Parents of Chinese students instigated legal proceedings against the San Francisco Public School System in 1973, alleging that the system was not meeting the needs of the non-English-speaking students. The legal issue was that the Chinese students were being denied equal protection of the laws and that the system was violating Section 601 of the 1964 Civil Rights Act which bans discrimination on any grounds in all programs receiving Federal financial assistance.[118]

The plaintiffs' claim was rejected by both the District Court and the Ninth Circuit Court of Appeals. The Appellate Court reasoned that provisions for special services by the school board, in addition to those

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[116]Ibid., p. 244.

[117]Ibid., p. 238.

[118]Lau v. Nichols, 414 U. S. 563 (1974), 483 F. 2d, 791 (Ninth Cir., 1973).

provided for students in general, was not constitutionally required. The case was then appealed to the United States Supreme Court.

Decision

The Supreme Court reversed the ruling of the Court of Appeals and ruled that the lack of special remedial English instruction was a violation of the 1964 Civil Rights Act. Writing the majority opinion for the Court, Justice Douglas stated:

> Under these state-imposed standards, there is not equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum...; basic English skills are at the very core of what the public schools teach, and students who do not understand English are effectively foreclosed from any meaningful education.[119]

Discussion

In this case, the Court moved from requiring equal treatment for all children to a ruling that said that equal treatment for all students that has discriminatory results is not legal under the 1964 Civil Rights Act. This case went beyond the simple rights of a student to attend school and addressed the issue of fitting the curriculum to the needs of the students.

The implications of this decision for school reform are apparent: in order for a program to be acceptable to the Courts, it must be appropriate to the needs of the students. Handicapped children will find that this legal principle will have much impact on their quest for appropriate educational programs.

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[119]Ibid., p. 566.

This decision may also have impact on the grouping and tracking issue. If the grouping plan does not provide the student with an appropriate educational program, and if it does not benefit the student more than a nongrouped program, a legal case could be raised based on the precedent established in the Lau v. Nichols case.

Morgan v. Kerrigan
530 F. 2d. 401 (First Cir. 1976)

Facts

The Boston School Committee was ordered by the District Court of Massachusetts to implement a court-ordered desegregation plan. The School Committee appealed this ruling to the First Circuit Court of Appeals. One of the issues in the desegregation plan involved the question of whether or not a school system could operate an elite academic school if low income or minority children might be underrepresented in the student body.[120] Several other issues were included, but the above issue is the only one that related specifically to grouping and tracking.

Decision

The First Circuit Court of Appeals affirmed the rulings of the District Court on each issue. The District Court had ordered the elite schools to guarantee that each incoming class would have at least 35 percent minority students. The Boston School Committee had alleged

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[120]Morgan v. Kerrigan, 530 F. 2d. 401 (First Cir. 1976).

that this was in conflict with the Supreme Court's ruling in Swann v. Mecklenburg where fixed quotas were not required.

The Court of Appeals reasoned that the elite schools were a definite part of the total Boston School System which previously had been found to be administered in an unconstitutional manner. The "academically elite" schools were considered to be unlawfully segregated, and the Court ruled that they must be included as a part of the remedial plan of desegregation.[121]

The Court stated that this order was a temporary, expedient order designed to insure that the academically elite schools participated fully in the Boston desegregation paln. Once the full desegregation of the elementary schools was achieved and advanced work classes successfully integrated, the Court projected that neutral admission policies could once again be established for the elite schools.[122]

Discussion

The Court stated in its ruling that it is not unconstitutional, per se, for a school system to operate an elite school even though low income or minority children may be underrepresented in the student body due to their low scores on the admissions tests. Even so, the Appeals Court refused to overrule the District Court's order that the Boston elite schools had to operate with a racial quota system for the incoming classes. While the Court attempted to justify this ruling with its stated legal position by projecting that the quota system could be

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[121]Ibid., p. 424.

[122]Ibid., p. 425.

removed within a few years, it is questionable whether or not this part of the ruling is in conflict with the United States Supreme Court's ruling in Swann v. Mecklenburg.

Bray v. Lee
337 F. Supp. 934 (1972)

Facts

The plaintiffs in this case were a group of female students who alleged that they were required to score higher than boys on academic tests for admission to a special academic school. They sought an injunction and declaratory relief against this admissions policy.

Decision

The District Court ruled that the Boston School Committee could not use a different standard to determine the admissibility of boys and girls to any school operated by the City of Boston, including the Boston Latin School. To do differently, the Court stated, would be a violation of the Equal Protection Clause of the Fourteenth Amendment, which plainly prohibits prejudicial disparities before the law.[123]

Discussion

The Court came to the same conclusion in this case involving alleged discrimination based on sex that other courts had in cases involving alleged racial discrimination. Thus, Bray helped to establish that the Equal Protection Clause of the Fourteenth Amendment applies to all forms of discrimination.

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[123]Bray v. Lee, 337 F. Supp. 934 (D. C. Massachusetts, 1972).

The Court stated that local school systems do have the right to establish different admission standards for different kinds of schools, but that they cannot use separate standards for boys and girls for schools of the same type.

Berkelman v. San Francisco Unified School District
501 F. 2d. 1264 (Ninth Cir., 1974)

Facts

The plaintiffs in this case were parents of black children who had not been admitted to the academically elite Lowell High School in San Francisco. The school system assigned students to this school whose academic achievement placed them in the top fifteen percent of the junior high school graduates in the district. The District Court denied the plaintiffs' request for an injunction ordering the school system to change its method of assigning students to Lowell High School, and the plaintiffs appealed to the Ninth Circuit Court of Appeals.

One of the issues in the appeal was whether a school district could admit students to a preferred high school based on past academic achievement if the percentage of black, Spanish-American, and low-income students who qualify was substantially lower than the percentage of such students in the school district. Another issue related to classification was whether a school district could require higher admission standards for girls than for boys in order to maintain an equal number of boys and girls in the academically elite school.[124]

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[124]Berkelman v. San Francisco Unified School District, 501 F. 2d. 1264 (Ninth Cir., 1974).

Decision

The Court ruled against the plaintiffs and upheld the constitutionality of the school board's plan for assigning students to the academically elite Lowell High School. The Court reasoned that:

> Admission standards were not unconstitutional since the district's legitimate interest in establishing an academic high school far outweighed any harm imagined or suffered by students whose academic achievement had not qualified them for admission to that school.[125]

The Court examined the plaintiffs' claim that certain minority students were being denied equal educational opportunity as a result of the method of selecting students for admission to Lowell. The Court noted that the school had not become an exclusive province of the affluent and white as evidenced by the fact that over 37 percent of the students were Oriental and over 12 percent were black and Spanish-American. The Court noted that the percentage of black and Spanish-Americans was considerably less than the district-wide percentages; however, the Court found absolutely no evidence that the admission standards were intentionally discriminatory nor that they were neutral standards applied in an intentionally discriminatory manner.[126]

In the second major issue of this case, which involved higher admission scores for girls than for boys in order to insure a balance of the sexes in the elite school, the Court ruled that this practice was a violation of the Equal Protection Clause of the Fourteenth Amendment.[127]

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[125]Ibid., p. 1268. [126]Ibid., p. 1266. [127]Ibid., p. 1269.

Discussion

Unlike some of the earlier cases, this case obviously was not related to racial discrimination. The form of grouping used by the San Francisco School System was not racially suspect since it did not depend on scores made on standardized tests. The Court viewed the admission standard of past academic achievement to be a nonsuspect classification. Since the school district was able to present proof that this special school did, indeed, further the system's total educational objectives, and since it was able to prove that its assignment policies were not racially motivated, the Court had no recourse but to rule in favor of the school system.

Using the same reasoning regarding the lack of educational soundness in requiring racial balance in this special school, the Court likewise concluded that a balance of males and females was not a requirement for meeting the goal of better academic education. Thus, the Court determined that separate admissions requirements for boys and girls were discriminatory.

Since the academic standards at Lowell High School were very high and resulted in its graduates being prepared for admission to the better universities and hence, to better jobs, the Court correctly determined that higher standards of admission for girls was a direct discrimination based on their sex.

CASES RELATED TO CLASSIFICATION AND PLACEMENT OF STUDENTS BASED ON ACADEMIC ABILITY OR HANDICAPPING CONDITION

Stewart v. Phillips
C. A. No. 70--1199 F (D. Mass., Sept. 1970)

Facts

Parents of black children filed a class action suit on behalf of all black and/or poor students in the Boston School System who allegedly had been misclassified as mentally retarded and improperly placed in special education classes. The plaintiffs were seeking monetary damages of $20,000 for each misclassified child, an end to all placements based solely on I.Q. scores, revisions in placement procedures that would ensure that no student may be excluded from school because of handicapping condition, the use of better qualified psychologists, and the development of a transitional compensatory program for children previously misclassified.[128]

The complaint filed by the plaintiffs contained the following specific allegations regarding the existing identification and placement program for handicapped children:

(1) The classification system was improperly evaluated and not rationally related to classification decisions.

(2) The tests used for evaluation were biased and standardized to a white, middle-class norm.

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[128]Stewart v. Phillips, C. A. No. 70--1199--F (D. Mass., 1970).

(3) The single-score tests failed to distinguish among a wide-range of learning disabilities.

(4) Many of the school psychologists were unqualified to administer and interpret the tests.

(5) Parents were given inadequate notice concerning classification meetings.

(6) Students were being denied equal protection and due process because they were segregated from normal children and thus subjected to stigmatization by peers and teachers.[129]

The Boston School System filed a motion for summary judgment in July of 1972, claiming that there was no disagreement as to the facts. During the interval between 1970 and 1972 the Massachusetts Department of Education had issued new regulations concerning the placement of students in special education classes. The school system maintained that these regulations, when properly implemented, would correct all of the issues contained in the plaintiffs' original action.

Decision

In January of 1973, the District Court Judge denied the defendants' motions for dismissal of the complaint. Evidence had shown that there was still considerable disagreement as to the facts. The plaintiffs contended that old test data was still being used to place children in special classes; that the special classes were still being used as dumping grounds for behavior problems, and that the parents were not

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[129]Ibid.

being involved in placement decisions. The District Court Judge concluded that the new regulations of the State Department of Education did not make provisions for remedying past wrongs which may have occurred.[130]

Diana v. State Board of Education
C-70 37 RFT (Feb. 1970)

Facts

The plaintiffs in this action were parents of Spanish-speaking children who claimed that their children had been misplaced and mislabeled as a result of tests that were either biased or that had been unfairly administered. Since these intelligence tests were administered in English, the parents contended that this violated the Equal Protection Clause of the Fourteenth Amendment.[131]

The plaintiffs claimed that irreparable damage was being done to their children who were stigmatized as mentally retarded when in fact the intelligence tests were biased.[132] The plaintiffs were seeking injunctive and declaratory relief against further identification and placement based on standardized tests.

Decision

The defendants in this case were members of the State of California Board of Education. They agreed with the plaintiffs on a number of the

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[130]Ibid.

[131]Diana v. State Board of Education, C. A. 70 37 RFT (N. D. Cal., Feb. 3, 1970) Clearinghouse No. 2859.

[132]Ibid.

issues, and they agreed to an out-of-court settlement which contained the following main points of the agreement.

(1) All children whose primary home language is other than English (e.g. Spanish, Chinese, etc.) from now on must be tested in both their primary language and in English.

(2) They may be tested only with tests or sections of tests that don't depend on such things as vocabulary, general information ("Who wrote Romeo and Juliet?"), and other similar unfair verbal questions.

(3) Mexican-American and Chinese children already in classes for mentally retarded must be retested in their primary language (unless they were previously tested in it) and must be reevaluated only as to their achievement on nonverbal tests or sections of tests.

(4) Each school district is to submit to the state in time for the next school year a summary of retesting and reevaluation and a plan listing special supplemental individual training which will be provided to help each child back into regular school classes.

(5) State psychologists are to work on norming a new or revised IQ test to reflect Mexican-American culture. This test will be normed by giving it only to California Mexican-Americans so that in the future Mexican-American children tested will be judged only by how they compare to the performance of their peers, not the population as a whole.

(6) Any school district which has a significant disparity between the percentage of Mexican-American students in its regular classes and in its classes for the retarded must submit an explanation setting out the reasons for this disparity.[133]

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[133]Ibid.

Discussion

Since this case was settled out of court, no legal precedent was established by the case; however, the issues raised in this case and the subsequent agreement between the school board and the plaintiffs led to the decision by the State of California Board of Education to adopt specific guidelines for the classification and placement of special education students.

Larry P. v. Riles
343 F. Supp. 1306 (N. D. Cal., 1972)

Facts

Parents of black students in the San Francisco School System initiated a class action suit challenging the placement of their children in classes for the mentally retarded. Their contention was that their children had been improperly labeled and placed in special classes, thus violating their constitutional rights under the Equal Protection Clause and violating their rights to equal educational opportunities. Specifically, the plaintiffs' suit contained the following allegations:

(1) That the children were improperly placed in special classes when, in fact, they were not even mentally retarded;

(2) That testing procedures failed to recognize their cultural differences and ignored their learning experiences in their environment;

(3) That the tests used for placement had been normed only on white Anglo-American children and therefore were not proper tests to use as a basis for placing black children in special classes;

(4) That the improper placement was a stigma which caused peer ridicule;

(5) That special education classes contained a disproportionate percentage of black students, and that the inferiority of the special education programs resulted in a denial of equal educational opportunity for the black students.[134]

Based on these allegations, the plaintiffs sought to enjoin the school board from using unfair and biased tests as a basis for placing black children into classes for the mentally retarded; to remove all black children from such classes until they could be reevaluated with culturally-fair tests; to remove from school records all statements concerning prior placement of black students in special education classes; and to employ additional black psychologists for the school district.

Testimony in the case revealed that blacks comprised 66 percent of the retarded classes while the total school population contained a black population of only 28 percent.[135]

Decision

The District Court for the Northern District of California ruled that black students could no longer be placed in classes for educable mentally retarded on the basis of IQ tests which result in racial imbalance in the composition of the classes.[136]

The court concluded that because blacks constituted 66 percent of all educable mentally retarded classes, but only 28 percent of the total

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[134] Larry P. v. Riles, 343 F. Supp. 1306 (D. C. N. Dist. Cal., 1972).

[135] Ibid., p. 1307.

[136] Ibid., p. 1308.

district enrollment, racial imbalance caused by I. Q. test scores did exist. The Court ruled that the school system had not shown a rational relationship between the results of the I. Q. test and a student's ability to learn, particularly in the case of black students. Since the school system could not demonstrate such a relationship, the Court granted the plaintiffs' request for an injunction against the use of such tests for identification and placement of black students in special classes.

The Court did not require the removal of all black students from classes for the mentally retarded; however, the ruling did require an annual reevaluation of all students so placed. This case was left open for a later permanent ruling regarding the legality of the I. Q. tests. In 1974, the preliminary injunction against the use of tests for placement purposes was extended to the entire state of California.

Discussion

This was an important decision in the series of cases involving the use of I. Q. tests for placement of minority students into classes for the mentally retarded. While the decision did not eliminate all I. Q. testing as the plaintiffs had sought to do, it did prohibit the San Francisco School District form using such tests as the main criteria for placing blacks in classes for the mentally retarded.

Another portion of the ruling in this case which has since become an important part of state and federal regulations regarding exceptional

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[137]Ibid., p. 1311

children is the requirement for annual reevaluation of all children placed in special classes.

This case, which was filed in 1971, is now back in the Federal Court in San Francisco. A judge is currently taking testimony regarding the use of I. Q. tests for placement of students into special education classes. While the case specifically involves only the placement of California's black children, the decision could affect all of the states. The issue at stake in the current trial is whether or not to convert the temporary injunctions against the uses of standardized I. Q. tests into permanent injunction.[138] Should this happen, it is likely that the use of standardized I. Q. tests for all purposes would be greatly decreased.

Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania (PARC), 334 F. Supp. 1257 (E. D. Pa. 1971), 343 F. Supp. 279 (1972).

Facts

The plaintiffs, who were parents of retarded children, challenged the constitutionality of statutes and practices which excluded retarded children from public education in the state of Pennsylvania. The class action suit attempted to secure a guarantee of a full due process hearing before the educational status of students could be changed, the right to a free and appropriate educational program for each individual student, and the assurance that students who had been wrongfully excluded from any

[138]Associated Press dispatch, Greensboro (N. C.) Daily News, October 3, 1977, Sec. A, p. 8, cols. 1-2.

educational opportunity would be provided with a compensatory educational program.[139]

Decision

In October of 1971, the Federal District Court of the Eastern District of Pennsylvania entered an interim order and injunction approving a consent agreement in which the defendants recognized their obligation to place each mentally retarded child in a free and appropriate educational program. The agreement further stipulated that no statutes could be interpreted in such a way as to deny any mentally retarded child access to such programs. The order required the school systems to reevaluate the educational assignment to every mentally retarded child at least every two years.[140]

On May 5, 1972, the Court issued an order finalizing the previous consent agreement. This final agreement included a twenty-three step procedure guaranteeing due process for every child before he could be assigned to a class for the mentally retarded. This order and injunction reaffirmed and made final the mandate upon the State to provide equal access to educational services for all mentally retarded children.[141]

Discussion

This decision has proven to be a landmark decision in the area of classification of students. While this case was related specifically to

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[139] Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania (PARC), 334 F. Supp. 1257 (D. C. E. D. Pa. 1971).

[140] Ibid., p. 1260.

[141] Ibid., p. 1279.

mentally retarded children, later cases used the language of the decision in PARC to extend the educational benefits to all handicapped children. The decision in the PARC case set off a chain-reaction of similar decisions in other states including Alabama, New York, Massachusetts, Tennessee, Georgia, Maine, South Carolina, and Indiana.[142] No doubt, this decision, along with other similar ones, was largely responsible for the eventual passage of The Education of All Handicapped Children Act of 1975 (P.L. 94-142.).

An important part of the consent agreement in PARC is the establishment of comprehensive due process procedures which school systems must follow before removing a student from a regular classroom and assigning him to a classroom for the mentally retarded. Using the same reasoning that the Court used in this case, it is conceivable that future cases relating to tracking or grouping of normal children could require the same type of due process procedures before students could be placed in low groups or tracks.

Mills v. Board of Education of the District of Columbia
348 F. Supp. 866 (D. D. C. 1972)

Facts

The plaintiffs in this case were Peter Mills and six other children who had a variety of handicaps and discipline problems. The defendants were the Board of Education and the Department of Human Resources of the District of Columbia. The parents of the children brought suit alleging

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[142]Leapold Lippman and I. Ignacy Goldberg, Right to Education (Columbia University: Teachers College Press, 1973), p. 53.

that their children had been denied public education benefits as a result of labeling and that this was done without due process procedures. The plaintiffs were seeking declaratory, preliminary and permanent injunctive relief to prevent continued educational deprivation in violation of their rights.[143]

Decision

Judge Waddy of the District of Columbia Federal District Court handed down a preliminary injunction and order on December 20, 1971 which ordered the defendants to:

(1) provide named-plaintiffs with a publicly-supported education suited to their needs;

(2) provide plaintiffs' counsel with a list of every school age child known not to be attending a publicly-supported educational program because of suspension, expulsion, exclusion or any other denial of placement;

(3) initiate efforts to identify remaining members of the class not known to them;

(4) consider, with plaintiffs, the selection and compensation of a master who would determine the proper placement of children in contested cases.[144]

In August of 1972, Judge Waddy issued the final opinion and judgment in this case. The decision included the following points:

(1) The statutes of the District of Columbia, the regulations of the Board of Education, and the Constitution of the United States

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[143] Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D. D. C. 1972).

[144] Mills v. Board of Education of the District of Columbia, C. A. No. 1939-71 (December 20, 1971).

guarantee a publicly-supported education to all children including all "exceptional" children.

(2) The denial of all publicly supported education to the plaintiffs and their class, while providing such education to other children, was a violation of the plaintiffs' rights to equal protection of the law.

(3) Any exclusion, termination, or classification into a special program must be preceded by a due process hearing procedure.

(4) The school system was ordered to produce a comprehensive plan for serving all handicapped children and for providing for full due process procedures for all students before they could be excluded, suspended, or reclassified.[145]

Discussion

The Mills decision significantly expanded the legal principles established in PARC to include all handicapped students and all students involved in disciplinary action. While the decision had no binding effect outside the District of Columbia, it did serve as a persuasive example to other school systems and states where similar legal questions were being raised regarding handicapped children.

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[145] Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D. D. C. 1972).

Chapter V

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

This study was not designed to reach any conclusions regarding the educational advantages or disadvantages of the various ability grouping and tracking organizational plans being used by many school systems throughout the United States. However, based on an analysis of the research, it is apparent that some forms of grouping and classification of students will continue to exist within the public schools. Therefore, if circumstances require that certain grouping or classification practices be continued, or if school officials choose to initiate or continue ability grouping and tracking organizational practices, they should have access to appropriate information concerning both the educational and the legal issues of these practices in order that their decisions might be both educationally and legally sound.

It should be reiterated at this point that this research neither advocates nor condemns grouping and classification plans. By providing school officials with comprehensive summaries of the conclusions reached by recent studies regarding the educational advantages and disadvantages of various grouping plans, the writer believes that school officials who read these summaries should be better prepared to make sound educational decisions.

Another purpose of the review of the educational research related to the issues of grouping, tracking, and classifying students was to identify educational issues which may become legal issues. Before any conclusions

could be reached concerning the legal aspects of these practices, it was necessary to identify and review the educational research related to ability grouping, tracking, and classification.

As a guide to the educational and legal research, several questions were formulated and listed in the introductory chapter of this study. While the review of the literature concerning both the educational and the judicial issues associated with grouping, tracking, and classifying students provided answers to some of these questions, most of the answers were contained in chapters three and four. The answers to these questions comprise the major portion of a set of legal guidelines which school administrators and other educational decision-makers can use when making decisions related to grouping, tracking, or classification practices.

SUMMARY

In the introductory material in chapter one, the terms ability grouping, achievement grouping, and tracking were defined. While the technical definitions are different, these are virtually the same in actual practice. Ability and achievement grouping occur more often in elementary schools, while tracking practices are found most often in the junior and senior high schools. Various schools use different criteria for making placement decisions; however, the results generally are the same in that the students who are slow learners are segregated from the mainstream of the school population and placed in a low ability or achievement group or in a low track.

Reiterating a statement made in the introduction to chapter two, "A Review of the Literature," no attempt was made to include a

comprehensive and exhaustive review of the educational aspects of grouping. Selected key studies, however, were reviewed and summarized in an effort to clarify the basic judicial considerations contained in the court cases which are reviewed in chapters three and four.

The first research guide question listed in chapter one was to identify the major educational issues regarding grouping and tracking. Based on the review of the recent literature, the following questions concerning ability grouping continue to furnish ample debate material for educators:

1. Does ability grouping result in increased student achievement?

2. Do students who are placed in low groups develop low self-concepts as a result of the grouping?

3. Do grouping practices result in a "self-fulfilling prophecy" concept for students who are placed in the low groups?

4. Are standardized tests appropriate instruments to use for placing students in groups or tracks?

5. Do students in the lower groups or tracks have equal educational opportunities?

While the literature does not reveal universal agreement among educators concerning the above educational issues, certain trends are discernable. The following points appear to be representative of the conclusions reached by most of the recent research related to ability grouping and tracking.

1. Research studies are not conclusive at this time regarding the effects of ability grouping on academic achievement.

2. Ability grouping does not appear to have a positive or a negative effect on academic achievement of students in any groups. (Some studies, however, did conclude that ability grouping resulted in a slight increase of achievement for those students in the high groups.)

3. Students in the low groups or low tracks generally have low self-concepts; research studies are not conclusive as to the effect of ability grouping on student self-concepts.

4. Grouping usually results in the isolation of ethnic minorities and low socio-economic students from the mainstream of the school.

5. Grouping has a tendency to result in a "self-fulfilling prophecy" whereby teachers expect less of certain groups, and the students perform according to expectations.

6. When standardized tests have been used as the major criteria for assigning children to classes, and where this has resulted in racially identifiable classes, the courts have consistently ruled that tests cannot be used for this purpose.

7. The over-dependence on test results for classifying and placing students in special education classes has resulted in numerous court cases and in the passage of numerous state and federal laws designed to protect students from being misclassified.

8. School systems must ensure that all students are afforded appropriate due process procedures before they are labeled and assigned to any special education classes.

9. The question of whether of not students should be afforded due process before being assigned to low tracks or groups has not been tested in court, and it continues to be a debatable issue among educators.

10. Equal educational opportunity is not enhanced by the practice of ability grouping as evidenced by the fact that the low groups often are taught by the most inexperienced teachers; by the fact that the low tracks generally lead to low-paying jobs; by the fact that compensatory educational programs designed to help students in the low groups "catch up" seldom are effective; by the fact that low achievers of all sorts are placed together and thus denied the stimulation of middle-class children as helpers and learning models; and by the fact that the non-academic goals of the schools, such as building good citizens, are actually subverted by ability grouping plans in many instances.

11. Effective alternatives to ability grouping which could enhance learning by students include tutoring, team teaching, individually programed instruction, and stratified heterogeneous grouping.

The second question posed in the introductory chapter was concerned with the identification of educational issues related to grouping that are likely to find their way into the courts. An examination of the cases reviewed in chapter four and an analysis of the legal issues discussed in chapter three indicate that the major educational issue is whether or not ability grouping results in improved educational opportunities for the students. This educational question could become a legal concern in the future as individuals seek judicial answers to questions involving equal protection of the laws. The changing interpretation of the Fourteenth Amendment by the courts indicates that the burden of proof will continue to shift to the school administrators to prove that grouping practices will, in fact, result in improved educational opportunities for the students.

A sequential review of the court cases reveals that the courts are now requiring the participants to present educational facts and information in order that their decisions can reflect both the educational and the legal issues. This is in contrast to earlier cases where the courts consistently declined to consider educational factors in making decisions concerning the legality of grouping, tracking, classification, and related practices.

The administration and use of standardized tests is another educational issue related to grouping, tracking, and classification which has already been litigated. With the implementation of P.L. 94-142, The Education of All Handicapped Children Act, it is predicted that the use of standardized tests will continue to be a litigious educational issue.

The identification of the legal principles relating to grouping and tracking that have been established by the United States Supreme Court "landmark" cases was the essence of the third research guide question. While there have been no Supreme Court decisions directly related to grouping and tracking, certain legal principles established by such cases as Brown v. Board of Education, Alexander v. Holmes, Swann v. Charlotte-Mecklenburg, Goss v. Lopez, and Wisconsin v. Constantineau are related directly or indirectly to these educational practices. Below are examples of related legal principles established by these decisions:

1. The doctrine of "separate but equal" has no place in American education.

2. The opportunity for education, where a state has undertaken to provide it, must be made available to all on equal terms.

3. Local school boards, and not the courts, have the duty and responsibility of assigning students and operating the schools in a constitutionally acceptable manner.

4. Due to educational disparities caused by dual school system operations in the past, school boards may have to resort to affirmative action practices in order to completely dismantle dual school systems.

5. Corrections must be made for any discrimination caused by official actions.

6. An individual cannot be publicly labeled and stigmatized without first being afforded appropriate due process procedures.

7. Public education, once established by a state, becomes a property right of individual students which is protected by the Due Process Clause of the Fourteenth Amendment.

Each of these legal principles has been referred to numerous times by the courts in decisions involving ability grouping and related practices. These legal principles must be considered by school officials when they are faced with decisions regarding ability grouping, tracking, classification, or related educational practices.

The fourth guide question listed in chapter one was whether or not school officials could continue to use the results of standardized tests for purposes of assigning students to various tracks or groups. The literature reviewed, along with an analysis of the related court cases and the interpretation of P.L. 94-142 indicates that school systems cannot solely depend on test results for purposes of assigning students to classes for the handicapped. Although the use of test results for purposes of assigning students to groups or tracks has not been litigated

since the 1967 Hobson v. Hansen case, it would appear that there is sufficient similarity between classifying students for placement into classes for the handicapped and assigning students to low ability groups and tracks to preclude the exclusive use of standardized test results for these placements.

Standardized tests can be used by school officials as one of the criteria for placing students in groups or tracks if the tests are unbiased and valid instruments and if they are administered in a non-discriminatory manner. The tests must be administered to the student in his native language, and they must reflect the student's environment and cultural heritage. Even if these precautions are followed, and the result is that the low groups contain a disproportionate percentage of minority students, the school system must be prepared to prove that racial segregation was not intended and that the grouping plan does result in improved educational opportunities for the students in the lower groups.

The final three guide questions concerning ability grouping which the research attempted to answer were concerned with the identification of educational issues currently being litigated, the determination of whether or not any judicial trends are evident in the recent court decisions, and the enumeration of legally acceptable criteria for grouping decisions. The answers to these questions as revealed by an analysis of the literature and court decisions provides the framework for the "Conclusions" and "Recommendations" sections of this study.

CONCLUSIONS

Even when the legal issues appear to be the same as those in a case already decided by the courts, a different set of circumstances can produce an entirely different decision in subsequent cases. Because of this, drawing specific conclusions from legal research is very difficult; however, based on an analysis of this study, the following general conclusions concerning the legal aspects of grouping, tracking, and classifying students can be made:

1. Legitimate grouping and classification programs which are designed to serve educational purposes and meet educational objectives likely will not be invalidated by the courts.

2. Decisions concerning ability grouping, tracking, classification, and the use of various testing instruments will continue to be the prerogative of school officials and not the courts.

3. Only if an individual's constitutionally protected rights have been denied as a result of the educational practice will the courts intervene with the educational decision-making prerogatives of local school officials.

4. Determining what constitutes a constitutionally protected right will continue to be a legal issue for the courts to decide.

5. While equal educational opportunity for all students falls within the realm of a protected right, the courts have not yet defined the nature of equality in the public schools; thus, legal questions regarding ability grouping, tracking, and classification of students, as related to the legal principle of equal educational opportunity, continue to be in a state of judicial flux.

6. Evidence of unbalanced racial composition in special education classes or in the low ability groups and tracks generally constitutes a judicial label of "suspect classification." This means that the burden of proof for justifying such practices in terms of educational benefits shifts to the school officials if the issue is litigated.

7. If the classification is based on "suspect criteria," or if a fundamental constitutional right such as denial of liberty or property is involved in a case, the courts have established the principle that there must be a compelling state interest served by the classification in order for it to be allowed to continue.

8. Classification of students for placement in special education classes has been interpreted by the courts as a stigmatization process requiring that both procedural and substantive due process procedures be extended before students can be placed in these classes.

9. In classifications based on unalterable human characteristics such as sex, race, illegitimacy, or handicaps, the courts will continue to scrutinize closely any rules or laws that tend to discriminate against such classes.

10. If students who are assigned to low tracks or low ability groups are stigmatized as a result, and/or if the assignments are based on inaccurate test results, it is conceivable that such students could successfully challenge these practices in the courts based on the denial of either due process or equal protection of the laws.

RECOMMENDATIONS

As stated in the introduction, it was not the intent of this study to reach any conclusions concerning the educational advantages or disadvantages of ability grouping and tracking practices. The stated purpose was to provide educational decision-makers with appropriate information regarding both the educational and legal aspects of these practices in order that they might be able to make decisions concerning these issues that would be both educationally and legally sound.

Some forms of student grouping and classification obviously are necessary if the public schools are to function in an orderly fashion. Decisions as to whether or not the schools will use ability grouping and tracking organizational patterns are left to the discretion of the local school officials. However, if decision-makers examine the recent studies related to ability grouping, they may conclude that grouping is not essential to the educational process. Assuming that a school system is using some form of student grouping or classification, school officials must develop and implement a plan which will ensure that students are not misclassified or stigmatized. School officials must guard against any arbitrary classification or grouping practices which impair or deny a student's protected constitutional rights. Ignorance simply will no longer be accepted as a legal excuse for having violated a student's constitutional rights, nor for escaping the personal consequences of such a violation. In order to ensure that the constitutional rights of all students are protected, school boards should formulate and

adopt a written plan to be followed when and if such practices are initiated. If this is not done, it is likely that the courts will mandate such action.

Based on the results of this study, the following guidelines concerning ability grouping and tracking have been formulated. These guidelines are based on the legal principles established by the United States Supreme Court landmark decisions and on discernable trends revealed by the numerous lower federal court decisions in cases related to these practices during the past decade. While these appear to be legally acceptable criteria to follow, school officials need to remember that individuals who feel their constitutional rights have been abridged may still initiate judicial grievances.

Guidelines for Grouping and Tracking Practices

(Note: Since P.L. 94-142 includes specific guidelines for the classification and placement of handicapped students, these guidelines are applicable to grouping and tracking of the "normal" students.)

1. All formal pupil grouping practices, including ability grouping and tracking, should have the formal approval of the Board of Education. A written plan which includes the rationale, the selection process, and plans for pupil evaluation and reassignment should be approved by the school board. The policy should begin with a statement that the board intends to give every student his or her constitutional rights in every action. The development of this statement should be done in conjunction with students, teachers, and administrators. The policy statement should

include an expansion of the legislative idea that all rules and regulations of the board are intended to be fair, reasonable, and for the good of the schools and of the students. The policy should state clearly that the board has the right and duty to make rules, but that such rules are not absolute. The executive dimension of the statement should be clear with intent to apply the rules equally to everyone and that no discrimination on the application of the rules will be tolerated.

2. All pupil groupings should be directly related to the objectives of the instructional program; teachers and principals responsible for the implementation of the instructional program should understand and be able to articulate this relationship.

3. All pupil groupings should be based on nondiscriminatory, objective standards which are directly related to the objectives and purposes of the grouping. (For example, a school should not use the results from a reading test to group students for a math class.)

4. Pupil groupings should not be permanent; within the school day, groupings should be maintained only for the portion of the day that is necessary to attain the educational objective.

5. If a grouping practice does not result in an improvement in the student's performance level, it should be altered or discontinued in order that it not become a permanent placement for disadvantaged students.

6. After a new pupil grouping plan has been initiated, and as soon as it is feasible to do so, school officials should collect test data and other tangible evidence to prove the plan is resulting in an increase in the educational benefits.

(Note: This assumes that gains in pupil achievement could be substantiated. If this is not the case, other evidence that the grouping plan is not depriving students of equal educational opportunity must be collected.)

7. Parents should be thoroughly informed concerning the educational programs available in the various tracks; they should also understand the future occupational and educational opportunities and limitations provided by the various tracks.

8. High schools should establish informal due process procedures for students before assigning any students to the lower tracks. Every effort should be made to ensure that low groups do not contain a disproportionate number of minority students.

9. If a school is organized based on tracks, such programs should be flexible in design so that students can move freely from one track to another without first having to take a large amount of extra work.

10. Parents of both elementary and high school students should be informed in writing of the school's testing program. This should include the purposes of the testing program, the anticipated use that will be made of the results, and information concerning the right of the parents to examine the tests.

Concluding Statement

If a school system decides to utilize ability grouping and tracking as its basic organizational plan, and if this results in substantial racial segregation, a high probability exists that some kind of legal action will be initiated either by the individual students or by the enforcement office of the Department of Health, Education, and Welfare.

Where racial segregation is not a factor, litigation may still be initiated. If a student feels that he has been stigmatized by the grouping process, or that the placement has been made as a result of an invalid testing instrument, or that the group or track assignment has resulted in a denial of equal educational opportunity, the student may seek relief in the form of an injunction against the school system's continuation of the practice in question. If the student can prove that the school officials and school board members have arbitrarily deprived him of a constitutional right, he may be able to receive financial remuneration from the individual school officials and board members.

While no school board plan or guidelines will ensure against the initiation of court action by individuals who feel their rights have been violated, school boards and school administrators can reduce the probability of having school practices invalidated and individual financial liability by formulating and implementing a set of guidelines governing ability grouping, tracking, and classification practices.

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